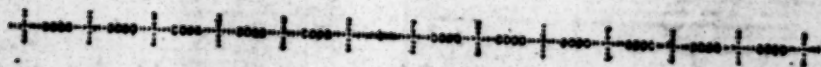




THE
DEBTOR'S
Pocket Guide, &c.



PRICE TWO SHILLINGS.

THE

D. E. B. T. O. R. S.

Robert G. B. & Co.

PRICE TWO SHILLINGS.

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T H E
D E B T O R's
Pocket Guide,
In CASES of ARREST;
CONTAINING
CAUTIONS AND INSTRUCTIONS
AGAINST THE
IMPOSITION AND EXTORTION
OF THE
SERJEANT at MACE, BAILIFF, GAOLER, &c.
S H E W I N G,

How a Person is to conduct himself on an Arrest: The Sheriff's Power in taking or refusing Bail: The Remedy a Person has against an Officer for Extortion on taking Bail, or for any Severity or Ill-usage to a Person in his Custody, or in a Lock-up House: The Charges such Houses have a Right to make under the Statutes and Rules of the superior Courts made for that Purpose, with the Remedy against them if they exceed their Bounds: The Method of putting in and perfecting Bail above on the Return of the Writ, to prevent the Bail being fixed, and the Plaintiff obtaining an Assignment of the Bail-bond; with an Account of the Fees the Sheriff and his Officers are entitled to on different Procefs.

The best and most approved Method of bringing the Writ of Habeas Corpus, with plain and apt Instructions for conducting and executing the same, with the real Expences thereof as settled by the Master and Prothonotaries of the respective Courts.

To which are added,

DIRECTIONS for procuring the Rules of the King's-Bench and Fleet-Prisons, with the Expences attending the same.

By an OLD PRACTITIONER. S

L O N D O N :

Printed by W. STRAHAN and M. WOODFALL, ^{UK}₉₄₂
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ADVERTISEMENT.

THE following sheets are collected from a great variety of the best law authorities, and thrown into a practical system of law, for the use of such as would wish to protect their persons and property from the severities of the law, particularly from the imposition of the serjeant at mace, bailiff, gaoler, &c. —The subject is divested of the technical phrases of the science, and divided into chapters, so as to afford useful intelligence to such who are not of the profession, as well as those that are.

The reader will here find almost every possible situation a person can be in when arrested for a debt, whether real or otherwise: for example, he will be informed how to conduct himself on an arrest, either by giving bail or by applying to a Judge to discharge the same on summons, If bail is necessary,
how

how he is to proceed to prevent his innocent friends from becoming a sacrifice to his necessities. If the circumstances of his affairs are such that he is obliged to render up his person to satisfy his creditors, how he is to remove himself from a private custody to one of the public prisons, or from one gaol to another; with directions and precedents for the doing thereof. And also how to obtain the rules of the King's-bench or Fleet-prison. In short, this book will be found a proper caution to those who would avoid the inconveniences of the law, and a sure guide to such who from the casualties of life become subject to its power.

In order to render this work more compleat and useful, the expence of each particular procedure is given, so that the party requiring the same may see, at one view, how far his pocket will assist him, without being put to the too common inconvenience of spending his *little All*, without obtaining the redress intended.

10th FEBRUARY,

1776.

T H E

T H E T A B L E O F C O N T E N T S.

	Page
<i>Bailable process</i> - - - - -	I
<i>Persons liable to arrests, and the grounds for the same</i> - - - - -	2
<i>Who are authorized to make an arrest</i> - - - - -	4
<i>Persons privileged from arrests</i> - - - - -	5
<i>When an arrest may be lawfully made, what places are privileged from arrests, and what are not</i> - - - - -	15
<i>How arrests are generally made, exemplified by cases from the reporters</i> - - - - -	19
<i>Bailiffs, gaolers, &c. their office and duty under the statutes and rules of the superior courts made for that purpose, under which is comprehended the regulations of lock-up houses and prisons</i> - - - - -	39
<i>Bail, the manner of taking same by the sheriff, and afterwards compleating it on the return of the writ, illustrated in a variety of select cases</i> - - - - -	70
<i>The remedy the law gives a person against a bailiff for any imposition or irregularity committed in the execution of his office</i> - - - - -	91

Bail-bonds

TABLE OF CONTENTS.

	Page
<i>Bail-bonds how to be taken by the sheriff's officers on an arrest, and afterwards assigned if bail above is not put in due time</i> - - - - -	105
<i>If bail-bond assigned, how to set it aside</i> - - - - -	107
<i>Directions for bringing and conducting the writ of habeas corpus for removing a person to the King's-bench or Fleet-prisons</i> - - - - -	128
<i>Forms of these writs, with instructions for suing out and completing the same</i> . - - - -	130
<i>How to compel bail above on the writ of habeas corpus brought</i> - - - - -	132
<i>Form of the writ of procedendo to carry the suit back to the inferior court when the party has neglected to compleat his writ of habeas corpus</i> - - - - -	133
<i>Fees of court on the writ of habeas corpus</i> - - - - -	135
<i>Instructions for committing the party on the return of the writ of habeas corpus, with the court-fees paid thereon</i>	136
<i>Directions for obtaining the rules of the King's-bench and Fleet-prisons</i> - - - - -	137
<i>How to discharge a person out of prison who is in execution</i> - - - - -	138
<i>Fees allowed to the sheriff and his officers under the statutes and determinations of the inferior courts on the different writs, whether the first process or writs of execution</i> - - - - -	143
<i>A table of modern fees</i> - - - - -	163

THE GENTLEMAN, MERCHANT
AND TRADESMAN'S

Pocket Guide, &c.

Bailable Process.

FOR the true understanding the following sheets, the reader must be informed, that there are three superior common law courts, viz. the court of king's-bench, the court of common pleas, and the plea side of the court of *Exchequer*, which to all intents and purposes is a court of common law. These courts cannot hold to bail for any sum under 10*l*, and that must be verified by oath, as will appear by the statutes made relating thereto. The process for bail in the king's-bench is the bill of Middlesex, (a precept of the court) if the party lives in Middlesex; or if in any other county, the writ of *latitat*. If the plaintiff would wish to prevent the defendant running him to a great expence in defending the suit, he must proceed by special *capias*, grounded on an original out of *chancery*, which will hinder the defendant, when judgment is obtained against him, from bringing a writ of error at law.

In the common pleas, the process for bail is a *capias*, and in the common law side of the *exchequer* the writ of *quo minus*.

By Stat. 13 Car. 2. The legislature gave a clause for bail, called an *ac etiam*, which is now introduced in all writs in the king's-bench and common pleas, where the party is intended to be held to bail, unless the proceedings

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are

are by original, when, instead thereof, in the special *capias* is set forth the count or declaration.

Having premised thus much as to writs for bail out of the superior courts, it becomes necessary to shew the reader how the liberty and property of every individual are protected by the statute law.

For what a Person may or may not be arrested.

By Stat. 12 Geo. 1. cap. 19. continued by Stat. 5 Geo. 2. cap. 27. No person is to be arrested by any process issuing out of a superior court, unless the cause of action amounts to ten pounds or upwards; nor by process of an inferior court, unless the cause of action amounts to forty shillings or upwards; but must be served personally with a copy of the process, within the jurisdiction of the court. Yet if the cause of action amounts to ten pounds, or forty shillings, as aforesaid, the plaintiff must make and file an affidavit thereof, (which may be sworn before any judge or commissioner of the court out of which such process shall issue; or else before the Officer who shall issue the process, or his deputy;) and the sum specified in such affidavit must be indorsed on the back of such writ or process, for which sum the sheriff, &c. must take bail, and for no more. But if any writ or process issue for ten pounds or upwards, and no affidavit or indorsement is made, the plaintiff must not arrest the body of the defendant, but must proceed as before directed, when the cause of action does not amount to ten pounds, or forty shillings as aforesaid.

By Stat. 5 Geo. 2. cap. 27. If the cause of an action does not amount to *ten pounds*, in a superior court, nor to *forty shillings* in an inferior court, no special writ, nor process specially expressing the cause of action, must be issued; and every attorney or officer in such court suing forth or issuing any such process, forfeits *ten pounds* to the person aggrieved.

Note. No person is to be arrested in actions on penal statutes, nor in slander, trespass, battery, wounding, or imprisonment, unless by order of court, or warrant from
a judge

As to Matters of Arrest.

3

a judge of the court out of which the process is issued ; nor in covenant, unless for the payment of money.

On what ground an arrest must be made.

An arrest must be made by virtue of some process, precept, or act of some court.

The King cannot command any one by word of mouth to be arrested ; it must be by writ, or order of his courts, according to law. 2 *Inst.* 186.

An officer to whom process, &c. is directed is not to dispute the authority of the court, but must execute the same at his peril.

If a court shall award a process to the sheriff to arrest a man without cause, the sheriff or his officers are not punishable for arresting him ; and although the justices afterwards amend their process, yet the sheriff, &c. shall be discharged. 20 *H.* 6. *pl.* 5.

Note. The following distinction is made ; that when the court has jurisdiction of the cause, and shall proceed erroneously, the officer or minister of the court is excusable, so as no action will lie against him ; but where the court has no jurisdiction of the cause, the proceedings are *coram non judice*, and an action will lie against the officer, without any regard of the precept or process of the court ; for it is not necessary to obey him who is not judge of the court, no more than a mere stranger. *Dalt.* 106.

By *Stat.* 43 *Eliz.* *cap.* 6. If any sheriff, or other person having authority to execute writs, make any warrant for the summons of any person, as upon any writ or suit, or for the arrest or attaching of any person by his body or goods, to appear in any of the courts at *Westminster* or elsewhere, (not having before that the original writ or process warranting the same,) upon complaint thereof to the justices of *assize* of the county, or to the judges of the court out of which the process issued, not only the party that made such warrant, but the procurers thereof shall be sent for by attachments, or otherwise, as the judges

4 *The Gentleman's, &c. Pocket Guide.*

shall think good, and be examined upon their oaths. And if the offence be confessed, or proved by witnesses, the judges shall commit the offenders to the gaol of the county, or court where the same shall be examined, until they have satisfied the party aggrieved, not only the sum of *ten pounds*, but also all such costs and damages, as the judges shall set down, that the party has sustained thereby, and *twenty pounds* a-piece for their offence to the king.

By Stat. 6 Geo. 1. c. 21. No high sheriff, under sheriff, their deputies or agents, shall make any warrants, before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of ten pounds. And every warrant, to be made out upon any writ out of the king's-bench, common pleas, or exchequer, before judgment, to arrest any person, shall have the same day and year set down thereon as shall be set down in the writ, under forfeiture of ten pounds to be paid by the person who shall fill up or deliver such warrant.

The Person authorised to make an Arrest.

The sheriff is the proper officer for executing all writs and process of the courts of law, and to him they are to be directed; for he is the immediate officer of the king and all his courts. He is sworn to do his office without any favour, dread or corruption. In some special cases where there is good cause of exception to or against the sheriff, writs or process must be awarded to the coroner, who then stands in the place of the sheriff. For Example:

Where it is alledged by either the plaintiff or defendant, that the sheriff is cousin, or otherwise of kindred, or tenant to the other party, and the other party does not deny it, in such cases process must be directed to the coroners of the county, and must be executed by them. *Dalt. Sher. 97.*

Where the sheriff is party to the suit, the process must be directed to the coroner. *Keilw. 96, 6.*

Dalton's Sheriff, p. 97, remarks, that the law books differ very much; for some hold a difference where the sheriff is plaintiff, and where defendant; for where he is plaintiff, the
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As to Privilege from Arrests.

3

the process shall be directed to him against the defendant, and he may serve it himself, except where he is named sheriff in the writ; for there the coroners must execute it.

Where the sheriff makes default in serving the process, it must be directed to the coroners. *Dalton's sheriff*, 98.

An attachment against the sheriff must be directed to the coroners, for his default in serving or returning the process, &c. *Ibid.*

Where partiality is found in the sheriff, the process shall be directed to the coroners; and the writ must be, that the sheriff shall not intermeddle. *Ibid.*

If the sheriff be dead or removed, or there be no sheriff, the process must not be directed to the coroners, but must stay till another sheriff is chosen; *ibid.* for the sheriff being the immediate officer of the court, process must not go to the coroners but only in special cases, as above. *Ib.*

Where the original process is directed to the coroners, all the subsequent process in that suit must likewise be directed to the coroners, although the sheriff be removed, dead, acquitted, and another indifferent sheriff be chosen, pending that suit and process. *Ibid.* 99.

Persons privileged from Arrests.

Peers of the realm or their servants may not be arrested, neither may members of parliament or of convocation, or their servants in the time of parliament or convocation, in certain days before and after; nor ambassadors or their servants; nor the king's servants, without leave; nor the lord-mayor of London; nor those persons whose attendance is requisite in any of the king's courts at *Westminster*, as the judges and their necessary servants, clerks and attornies, &c.

The person of the king is so sacred, that no violent hands may in any case be laid upon him; neither may he be impleaded or sued by action; but where the king shall seize any man's land, or take away his goods, (having no right by his laws so to do,) the subject for his remedy

6 *The Gentleman's, &c. Pocket Guide.*

must sue unto his sovereign by way of petition only.
Stamf. de prærog. 42, 72, 73.

The king's servant is not so privileged from arrests, but that the sheriff ought to return his writ, unless he shews his privilege on the arrest. 1 *Keb.* 40.

The privilege of the house of lords is, that no lord of parliament, sitting the parliament, or within the usual times of privilege, shall be imprisoned or restrained without order of the house; unless for treason or felony, or for refusing to give security for the peace. *Per ord. par.* 18 April, 1626.

And their goods taken in execution are to be delivered, as well as their persons. *Ib.* 8 May, 1628.

All their menial servants and those of their family, and also those employed necessarily and properly about their estates as well as their persons, are privileged. This freedom begins from the date of the writ of summons in the beginning of every parliament, and continues twenty days before and after every session. *Ib.* 28 May, 1624.

By *Stat. 1 Jac. 1. cap. 13.* If any person being arrested in execution, and by privilege of either house of parliament be set at liberty, the party at whose suit such execution was pursued, his executors or administrators, after the privilege of that session of parliament in which such privilege shall be granted shall cease, may sue forth a new writ of execution, as if no such former execution had been served. And no sheriff or officer, from whose custody such person arrested shall be delivered by privilege, shall be charged for delivering out of execution any such person by privilege of parliament set at liberty. But this act shall not diminish any punishment, to be by censure in parliament inflicted upon any person, which shall make or procure such arrest.

By *Stat. 12 & 13 W. 3. c. 3.* Any person may prosecute any suit in any of his majesty's courts at *Westminster*, or in chancery, or exchequer, or the dutchy court, or in the court of admiralty, and in all causes matrimonial and testamentary in the court of arches, the prerogative courts
of

As to Privilege from Arrests.

of *Canterbury* and *York*, and the delegates, and in all courts of appeal, against any lord of parliament, or any of the knights, citizens and burgesses of the house of commons, or their servants, or any other person intitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both houses for above fourteen days, until both houses shall meet; and the said courts may after such dissolution, prorogation or adjournment, proceed to give judgment and to make final decrees and sentences, and award execution thereupon; any privilege of parliament notwithstanding; provided that this act shall not subject the person of any of the knights, citizens and burgesses, or any other person intitled to privilege of parliament, to be arrested during the time of privilege; nevertheless if any person having cause of action or complaint against any peer, such person after any dissolution, prorogation, or adjournment, as aforesaid, or before any sessions of parliament, may have such process out of his majesty's court of king's-bench, common pleas, and exchequer, against such peer, as he might have had out of time and privilege; and if any person has cause of action against any of the knights, citizens, or burgesses, or any other persons intitled to privilege of parliament, after any dissolution, prorogation, or such adjournment, &c. such person may prosecute such knight, citizen or burgess, or other person intitled to privilege, in his majesty's courts of king's-bench, common pleas, or exchequer, by summons and distress *infinite*, which the said respective courts are empowered to issue until they enter into a common appearance, or file common bail; and any person having cause of suit or complaint may, in the times aforesaid, exhibit a bill or complaint against any peer, or against any of the said knights, citizens and burgesses, or other persons intitled to privilege, in the chancery, exchequer or dutchy court, and proved thereupon by letter or *subpœna*, as usual, and upon leaving a copy of the bill with the defendant, or at his last place of abode, may proceed thereon; and for want of appearance or answer, or for non performance of any order or decree, may sequester the estate of the party, as is used when the defendant is a peer; but shall not arrest the body of any of the said knights, citizens and burgesses, or other pri-

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privileged person, during the continuance of privilege of parliament. And where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or non-suited, dismissed, or his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed. And no suit or proceeding in law or equity against the king's original and immediate debtor, for the recovery of any debt originally and immediately due unto his majesty, or against any person liable to render account unto his majesty for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor or accountant, being a peer, shall not be liable to be arrested; or being a member of the house of commons, shall not, during the continuance of privilege, be arrested by any such proceedings.

By Stat. 2 & 3 Anne, c. 18. Any suit may be commenced and prosecuted in any of his majesty's courts at *Westminster* against any officer or person of public trust, for any misdemeanor, breach of trust, or any penalty imposed by law to enforce the due execution hereof; and no such suit or execution thereon, although such officer be a peer, or one of the house of commons, or otherwise intitled to privilege of parliament, shall be stayed by privilege. But nothing in this act shall subject the person of such officer, being a peer, to be arrested; nor subject the person of such officer, being of the house of commons, to be arrested during the time of privilege; and against such person, being of the house of commons, shall be issued summons and distress *infinite*, or original bill, summons, attachment and distress *infinite*, which the respective courts are empowered to issue, until they appear.

By Stat. 11 Geo. 2 c. 24. Any person may commence and prosecute in *Great-Britain* or *Ireland* any suit in any court of record or of equity, or of admiralty, and in causes matrimonial and testamentary, in any court having cognizance, against any peer of *Great-Britain*, or against any of the knights, citizens and burgesses, of the house of commons of *Great-Britain*, or against their menial or other servants, or any other person intitled to the privilege
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of the parliament of *Great-Britain*, immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after the adjournment of both houses for fourteen days, until both houses shall re-assemble. This act shall not subject any person intitled to privilege of parliament to be arrested during the time of privilege; nevertheless it shall be lawful for any of the courts of the great sessions in *Wales*, courts of session in the counties palatine of *Chester*, *Lancaster* and *Durham*, courts of king's-bench, common pleas, and exchequer in *Ireland*, after any dissolution, prorogation, or such adjournment, or before any session of parliament, or meeting of both houses, to use such proceedings, and to issue the like process against any such peer, or against any of the said knights, citizens and burghesses, or other persons intitled to the privilege of the parliament of *Great-Britain*, as the courts of king's-bench, common pleas, and exchequer, in *England*, are by 12. & 13 *W. 3. cap. 3.* impowered to use; and it shall be lawful for the chancery of *Ireland* and the court of equity in the exchequer there to use such proceedings, and to issue the like process, against the persons aforesaid, as the chancery of *Great-Britain*, and the exchequer in *England* are by the said act impowered to use; and shall be lawful for any of the other courts before described, (the process whereof is not particularly directed by the said act, or by this act,) after any dissolution, prorogation, or such adjournment as aforesaid, or before any session of parliament, or meeting of both houses, to issue like process against any such peer, or any of the said knights, citizens or burghesses, or other persons intitled to the privilege of parliament, as such courts may now lawfully issue against persons not liable to be arrested. And where any plaintiff by privilege of parliament shall be staid from prosecuting any suit commenced, he shall not be barred by any statute of limitation, or non-suited, dismissed, nor his suit discontinued for want of prosecution. And no proceedings in law or equity against the king's original or immediate debtor, for recovering any debt originally and immediately due to his majesty, or against any person liable to render an account for any part of the revenues, or other original and immediate duty, shall be staid in any court in *Great-Britain*; yet so that the person of such debtor or accountant, being a peer of *Great-Britain*,

16 *The Gentleman's, &c. Pocket Guide.*

Britain, shall not be liable to be arrested upon such suit, or being a member of the house of commons of *Great-Britain*, shall not during the continuance of the privilege be arrested upon any such proceedings.

A member of parliament is privileged, as well in his lands and goods as in his person; by *Roll C. J. Mich. 24 Car. B. R.* in lord *Mohune's* case, 2 *Lilly's Reg.* 370.

If a member of parliament be outlawed, and a *capias utlegatum* issued against him, and delivered to the sheriff, he may safely arrest him thereupon; for this writ is, *quod non omittas propter aliquam libertatem*, so that the party outlawed cannot be discharged thereof by any liberty or privilege, for he which is out of the protection of the law cannot have the privilege of the law. Per *Anderson* and *Periam* Justices, *H. 31 Eliz.*

Necessary officers, which attend the parliament, as the serjeant at arms, the porter at the door, clerks, and the like, shall not be arrested for debt or the like, during their attendance. *Crompt. Author des Courts, fo. 11.*

Note. Privilege of parliament continues only while the two houses are sitting, and ceases on prorogation. 2 *E. 4. fo. 8, Bro. tit. priv. 56.*

All protections and written certificates of the members of the house of commons were declared void in law, and none to be granted for the future, and if any shall be granted by any member, he is to make satisfaction to the party injured, and be liable to the censure of the house. *Per Ord. Par. 30 Jan. 1718.*

By *Stat. 10 Geo. 3.* Plaintiffs in suits have a power to proceed and prosecute their suits against peers and members, notwithstanding the meeting of parliament, and their persons only are protected from arrests. The servants of peers and members are by this statute deprived of any privilege they were before entitled to, and may now be arrested as common persons.

By *Stat. 8 Hen. 6. cap. 1.* Clergymen called to the convocation, &c. and their servants, shall have privilege, while

while going, continuing there, and returning, which the peers and commons of the realm in parliament have.

By Stat. 1 Rich. 2. cap. 13. Persons of holy church, whilst they attend divine service in churches, church-yards, and other places dedicated to God, shall not be arrested by royal authority, or commandment of spiritual lords, in offence of this liberty of holy church, upon grievous forfeiture, so as collusion be not found in the said persons of holy church.

By the same Stat. cap. 15. If any person shall arrest any person of holy church, in churches or church-yards, against the liberty of holy church, and thereof be convicted, he shall have imprisonment, and be ransomed at the king's will, and make gree to the parties; provided that the people of holy church shall not hold them within the churches or sanctuaries by collusion.

By Stat. 7 Ann. cap. 12. All process, whereby the person of any ambassador, or public minister of any foreign prince or state, or the domestic servants of any such ambassador, &c. may be arrested, or his goods distrained, shall be adjudged void. And the persons suing forth such process, their attorneys and solicitors, and other officers executing the same, being convicted thereof by the confession of the party, or by the oath of one witness before the lord chancellor, and the chief justices or any two of them, shall be deemed violators of the law of nations; and shall suffer such penalties and corporal punishment, as they or any of them shall judge fit. But no merchant or trader, within the description of any of the statutes of bankrupts putting himself into the service of any ambassador, &c. shall have any benefit of this act. And no person shall be proceeded against as having arrested the servant of an ambassador, &c. unless the name of such servant be first registered in the secretary's office, and transmitted to the sheriffs of *London* and *Middlesex*, who must hang it up in some public place in their office.

Easter, 4 Geo. 3. Triquet and others v. Bath. On a question before the court of king's-bench, whether the defendant was really, truly, and *bona fide*, a domestic servant

want of count *Hassang*, the *Bavarian* minister, or whether his service was only *colourable*, and a mere *sham* and *pretence*, calculated to protect him from the just demands of his creditors, held, That the privilege of foreign ministers and their domestic servants depends on the law of nations. Stat. 7 *Ann*, cap. 12. is declaratory of such law. All that is new in that *statute* is the clause sect. 4. which gives a summary jurisdiction for the punishment of the *infractions*. To entitle a domestic servant of an ambassador to privilege, it is enough to prove an actual *bona fide* service. *Vide Digest of adjudged cases in K. B.* page 754.

An attorney is privileged so long as he is an attorney upon record, although he does not practice, *Lutw.* 1667. *Digest of adjudged cases in K. B.* page 754.

Where an attorney is sued as executor or administrator, he shall not be allowed his privilege; nor in a joint action, with another not privileged, though if an action may be served, the want of privilege in one, shall not take away the privilege of the other. 1 *Salk.* 2. 245. 2 *Rolle's Abr.* 1295. 1 *Dent.* 298.

If plaintiff and defendant are both attornies of the same court, the defendant has privilege, and must be sued by bill, *Barnes cases*, 4to edit. 44. *Digest of adjudged cases in K. B.* page 750.

Attornies struck off the roll, are totally deprived of privilege, and may be sued as a common person, *Rolle's Abr.* 274.

The privilege of an attorney does not hold against the court of conscience in London, 3 *Burr.* page 1583.

If there be a joint cause of action against an attorney and another person, the plaintiff must declare against both as in custody, *Comb.* 465.

If an attorney sues by original or on any process, except an attachment of privilege, he thereby waves his privilege in such suit. *Digest of adjudged cases in K. B.* page 753.

Privilege shall not be allowed to a man where his wife is joined in the action with him. *Noy* 68.

Privilege has been allowed for a clerk in the office of *custos brevium*, and a writ of privilege signed by the judges of *C. B. Cro. Car.* 8.

A filacer claimed his privilege, but was denied it. For though the master may be privileged, yet the court takes no notice of the servant, for he has no necessary dependance on the court, 2 *Lilly's Abr.* 369.

The lord mayor of the city of *London* is privileged from all actions during his mayoralty, in regard of his office, except it be for felony or treason, or actions which concern freehold; this is, that he may not be hindered in the government of the city, which being the metropolis of the nation, is of higher concernment in respect of the public, than any man's particular interest. *Easter* 24 *Car. B. R.* 2 *Lilly's Reg.* 370.

By *Stat. 5 Geo. 2. cap. 30.* Every bankrupt shall be free from arrests in coming to surrender to the commissioners, and from actual surrender for forty-two days, or such further time as shall be allowed to finish his examination, provided such bankrupt was not in custody at the time of surrender; and in case such bankrupt shall be arrested for debt, or on any escape-warrant, coming to surrender, within the time beforementioned; then on producing the summons or notice under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and in case any officer shall detain such bankrupt, such officer shall forfeit to such bankrupt for his own use 5*l.* for every day he shall detain him. And in case any commission of bankruptcy shall issue against any person who shall have been discharged by virtue of this act, or shall have compounded with his creditors, or delivered to them his effects, and been released by them, or been discharged by any act of insolvency, then the body only of such person shall be free from arrest and imprisonment; but the future estate shall remain liable to his creditors (the tools of trade, necessary household goods, and necessary wearing apparel of such

such bankrupt and his wife and children only excepted) unless the estate of such person shall produce clear 15 shillings in the pound.

By Stat. 1 Geo. 2. cap. 14. No person who shall list himself to serve on board any of his majesty's ships of war, shall be liable to be taken out of the service by any process or execution (other than for some criminal matter) unless for a real debt, or other just cause of action, and unless before the taking out such process or execution the plaintiff or some other in his behalf, make affidavit before a judge of the court, out of which such process, &c. shall issue, or before some person authorized to take affidavits in such courts, that to his knowledge the sum justly due to the plaintiff amounts to 20l. a memorandum of which oath shall be marked on the writ, for which memorandum or oath no fee shall be taken: And if any person shall be arrested contrary to this act, it shall be lawful for a judge of such court, on complaint of the party or his officer, to examine the same, and by warrant to discharge such seaman without fees, upon proof made that such seaman was belonging to one of his majesty's ships; and arrested contrary to this act; and also to award costs, for recovery whereof he shall have the like remedy that the plaintiff might have had for his costs. And it shall be lawful for any plaintiff, on notice first given in writing of the cause of action to such seaman in his majesty's service, or left at his last place of residence before his entering into the service, to file a common appearance in any action for any debt, so as to entitle the plaintiff to proceed therein to judgment and outlawry, and to have an execution thereupon, other than against the body of him so belonging to one of his majesty's ships.

By Stat. 11 Geo. 2. cap. 2. The same with respect to a volunteer soldiers, only that the original debt for which he may be arrested by process or execution must amount to 10l.

By Rule Michaelmas 15 Car. 2. in K. B. No attorney shall presume, at his peril, to make, or cause to be made, any precept or writ with the clause of *ac etiam*, &c. against any heir, executor, or administrator; or in any case whereby the custom of the court special bail is not required.

By

By Stat. 8 Eliz. cap. 2. If any person shall maliciously, or for vexation, procure any other to be arrested or attached to answer in the marshalsea, or in any court within London or in any city, borough, town corporate, or other place, where any liberty is used to hold plea in actions personal, at the suit of any person, where there is no such person known, or without the consent of the person at whose suit such arrest or attachment shall be had, every person that shall so procure any arrest, &c. and shall be convicted by indictment, presentment, or by the testimony of two witnesses, or other due proof, shall suffer imprisonment six months, and before he shall be delivered, shall pay unto the party arrested or attached treble costs; and shall also forfeit unto such person in whose name he shall procure such arrest, &c. if there be such person known, 10l.

When an Arrest may be lawfully made.

An arrest in the night as well as the day is lawful,
9 Rep. 66. Cro. Jac. 486. 3 Salk. 46.

By Stat. 29 Car. 2. cap. 7. No person upon the lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree, (except in cases of treason, felony or breach of the peace,) but the service of every such writ, &c. shall be void; and the persons executing the same, shall be liable to answer damages, as if they had done the same without any warrant.

What places are privileged from arrests, and what are not.

No arrest must be made in the king's palace, where his royal person resides.

By Stat. 28 Hen. 8. cap. 12. The great mansion house purchased by the king, late parcel of the possessions of the archbishop of York, and the park, and the soil of the ancient palace at Westminster, and shall extend to all the streets leading from Charing Cross, to the Sanctuary Gate at Westminster, and in all the tenements on both sides of the street from the said Cross to Westminster Hall, situate between the Thames on the east, and the Park-wall on the west.

In

In which privilege no one must be arrested without leave first obtained by petition to the board of green cloth.

By Stat. 13 Rich. 2. cap. 3. The court of the steward and marshal of the king's house, (*i. e. the marshalsea court,*) shall not pass the space of twelve miles, to be counted about the lodging of the king.

By Stat. 8 & 9 W. 3. cap. 27. Any person who has any money owing to him from any person who shall be in *White-fryars, Savoy, Salisbury-court, Ram-alley, Mitre-court, Fuller's-rents, Baldwin's-gardens, Mountague-clofe, or the Minories, Mint, Clink, or Deadman's-place,* upon process taken out against such person, may require the sheriffs of *London and Middlesex*, head bailiff of the liberty of the dutchy of *Lancaster*, or high sheriff of *Surry*, or bailiff of the borough of *Southwark*, or their officers, to take the *posse comitatus*, or such other power as shall seem requisite, and enter the said pretended privileged places, and arrest, and in case of resistance or refusal to open the door, to break open any doors to arrest such person upon mesne or other process, or to seize the goods of such person upon any execution or extent; and if the sheriff, &c. shall neglect with such force to use their best endeavours for the executing of such process, he shall forfeit to the plaintiff 100 l. And if in the executing of such process, any person shall oppose any officer, he shall forfeit 50 l. and be by some justice of the peace committed to the common gaol until the next assizes and gaol-delivery, and such offender being convicted, shall suffer imprisonment, and be set in the pillory; and if any rescous be made of any prisoner taken by such officers, within the said places, the persons making rescous, or assisting, being convicted, shall forfeit 500 l. to the plaintiff; and if the person against whom such recovery shall be had, neglect to pay the sum recovered, with costs, within one month after judgment and demand made, upon producing a copy of the judgment, and oath made that the money is not paid, he shall by order of such court wherein he was convicted of such rescous, be transported for seven years; and if any person who shall have made any rescous, (knowing of such offence) being convicted, he shall be transported for seven years, unless in
one

one month he shall pay the plaintiff the debt for which he brought his action, with costs.

By Stat. 9 Geo. 1. cap. 28. If any person within *Suffolk-place*, or the *Mint*, or the pretended limits thereof, knowingly oppose any persons serving any writ, rule or order, or other legal process, or any escape warrant, or any justice of peace's warrants, or shall make assault or abuse any person serving such writ, &c. whereby such persons shall receive any damage, every person being convicted thereof, shall be guilty of felony and be transported. And upon complaint to any three justices of peace for *Surry*, by any person who has any debt owing to him, from any person residing in the *Mint*, &c. (such creditor having legal process taken out for recovery of his debt, and making oath before such justices, that a debt exceeding 50 l. is justly due to him from the person, against whom such complaint shall be made, and that he believes such person does reside in that place) it shall be lawful for the justices to issue their warrant to the sheriff of *Surry*, or the bailiffs of *Southwark*, requiring them to take the *posse comitatus*, or such other force as they shall think requisite, and enter the said *Mint* and arrest, or in case of resistance or refusal, to break open any doors to arrest such person, upon mesne or other process, and to seize goods upon execution or extent; and the sheriff, &c. refusing on such warrant, with such force to use his best endeavours for the executing such process, shall forfeit to the plaintiff 200 l. And if any person shall resist any officer of justice, or any person aiding such officer within the *Mint*, &c. or shall rescue any prisoner taken upon such writ, &c. within the said place, or shall there knowingly conceal any prisoner so taken, or any who rescued such prisoner, or shall be assisting in resisting such officer, or in rescuing such prisoner, or shall exercise any jurisdiction, or join in making any pretended rule or ordinance, for supporting any pretended privilege within the said place, or for opposing the execution of legal process, &c. every person so offending, and being convicted thereof on indictment or information, brought within six months after the offence, shall be guilty of felony and transported. And if any person wearing a mask or disguised habit, or having his face or body disguised, shall within the said place, &c. join in or abet any riot there, or shall in any disguise knowingly oppose the execution of any legal

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process,

process, &c. or assault or abuse any person serving such process, &c. every such person, being convicted, shall be guilty of felony and transported. And every person who shall apprehend any one guilty of the offences aforesaid, and prosecute him till convicted, shall receive for every such offender 40 l. to be paid by the sheriff of *Surry*, without fee, in one month after such conviction, and demand thereof made by tendring a certificate to the sheriff of the county, before whom such offender was convicted, certifying his conviction; and that he was taken by the person claiming the reward; and in case of dispute touching the reward, the judge shall in the certificate direct the reward amongst the parties, in such shares as shall seem reasonable; and if such sheriff should die or be removed, the succeeding sheriff shall pay it in one month; and if the sheriff make default, he shall forfeit to the person, to whom such money shall be due, double the sum he ought to have paid, to be recovered with double costs. And if any person shall be killed by such offender in endeavouring to apprehend him, the executors, &c. of each person so killed (on certificate of the judge of assize, or the two next justices of peace) shall receive 40 l. from the sheriff of the county where the fact was committed; and on failure of payment, such shall forfeit double the sum to be recovered with double costs. And if any such apprehender or prosecutor is guilty of any of the said offences, not being in prison for the same, and convicting two or more, he shall not only have the reward, but also be intitled to a pardon; and the charge of raising the *posse comitatus*, or other power for enforcing the execution of this act, or the act of 8 & 9 *W. 3. cap. 27.* shall be paid by the sheriff. And nothing in this act shall repeal the said act, or any law in force against pretended privileged places, or for suppressing riots, except in cases wherein other provision is made by this act.

By Stat. 11 Geo. 1. cap. 22. If any number of persons not less than three, shall within the hamlet of *Wapping*, *Stepney*, or any other place within the *bills of mortality* of the cities of *London* and *Westminster*, wherein persons shall unlawfully assemble for the sheltering themselves from their debts, of which complaint shall have been made by presentment of the grand jury at a *quarter sessions*, knowingly obstruct any persons serving any writ, rule, or order of any court, or other legal process, and shall assault or abuse any person,

person, serving or executing such writ, &c. whereby such person shall receive bodily hurt, the offender being convicted shall be guilty of felony and transported for seven years. And upon complaint to a judge out of any court, out of which the writ shall issue, of opposition within the said hamlet, or elsewhere within the *bills of mortality*, wherein such persons shall unlawfully assemble, &c. by any persons who have debts due to them from any persons sheltering as aforesaid, the creditor having any legal writ or process, and making oath before such judge, that a debt exceeding 50l. is justly due to him from the person against whom such complaint shall be made, and that such creditor verily believes, that the person is sheltered within such place, such judge is authorized to issue his order to the sheriff, his deputy or officers, injoining him or them to take the *posse comitatus*, and enter the said hamlet, or any place elsewhere, &c. mentioned in the said oaths, and to arrest such person on any mesne process, extent or execution, and to seize the goods of such person upon any execution or extent; and if such sheriff shall wilfully neglect to use his best endeavours for the executing such process, &c. he shall forfeit to the plaintiff 200l. And if any person shall knowingly resist any officer of justice in the execution of any writ, &c. in the said hamlet, &c. or shall rescue any prisoner taken upon such process, &c. or shall knowingly harbour or conceal any prisoner so taken, or any persons who rescued such prisoner, or shall be knowingly abetting in resisting any such officer, or in rescuing such prisoner, the offender being convicted upon indictment, or information to be brought within six months after the offence, shall be a felon and transported for seven years.

Of Arrests in general, and how they are to be made.

All writs and process directed to the sheriff, are usually delivered to the under sheriff, and he makes out warrants to the sheriff's bailiffs to execute them. Or he may make such warrant to a stranger.

The high sheriff may execute them himself; or the high sheriff may command his under sheriff, bailiff, or other sworn or known officer, to serve or execute them. And such commandment by word is good, without any precept in writing. *Dalt.* 103.

If the sheriff command another man (that is no sworn or known officer) to serve or execute any writ or process, or other warrant, he must deliver him the writ itself, or else a precept in writing; otherwise an action of false imprisonment will lie for the arrest. *ibid.*

The bailiff or other officer to whom any warrant is directed and delivered, ought with all speed and secrecy to execute the same. *ibid.*

If an action be entered in either of the counters in *London*, a serjeant may arrest the party without the sheriff's warrant. For the entry of the action there, is a warrant in law for the arrest, and the serjeants are the attendants at the counters, and may take notice of such entries; it being the custom of the city, used time out of mind, 1 *Lilly* 94.

Every man is bound by the common law to assist not only the sheriff in his office for the execution of the king's writs (which are the commandments of the king) according to law; but also his bailiff, that has the sheriff's warrant in that behalf has the same authority which the sheriff has, for the sheriff cannot do all himself, and if they do it, not being required, they shall be fined and imprisoned; but this is to be understood where the sheriff may lawfully do it, and that before the sheriff does use any force, he ought to demand, according to the law, the goods to be delivered, so as replevin might be thereof made, on refusal force ought to follow, and not to precede the commandment of the law, 2 *Inst.* 193.

By *Stat. 23 Hen. 8. cap. 10.* No sheriff, under sheriff, bailiff of a franchise, or other bailiff shall take any thing of any person by him arrested or attached, nor of any other, for the sparing of any arrest or attachment of the body; nor of any person arrested or attached, for fine, fee, suit of prison, letting to bail, or shewing any ease or favour, except for the sheriff 20d. the bailiff which makes the arrest or attachment 4d. and the gaoler, if the prisoner be committed, 4d. on forfeiture of treble damages to the party aggrieved, and 40l. one moiety to the king, and the other to the prosecutor, provided that the warden of the *Fleet*, and of the palace at *Westminster* shall not be damaged hereby.

A person

A person arrested in *Westminster Hall*, while the court is sitting, may be discharged on motion, if arrested on *mesne process*, but cannot if taken in execution; though even in that case the officer is punishable by the court. *Bulst.* 85. *Vide Salk.* vol. 3. page 46.

Easter 7 Will. 3. Anonymous. Adjudged, That a common bailiff is not bound to shew his warrant, either at the time of the arrest; or at any time after; but he is bound to shew the cause of the arrest, and at whose suit; but a special bailiff may be required to shew his warrant, for he is not known as a common bailiff is, and no man is bound to submit himself to one who is not known or presumed to have an authority. *Moor* 767. 6 *Rep.* 54. 9 *Rep.* 69.

If a writ is returnable, 9 *Feb.* or in eight days of the purification, &c. and the defendant cannot be arrested by virtue of such writ, either on the 10th or 11th of *February*, though it is before the fourth day after, if the person is arrested, the officer cannot justify it, either in an action of trespass or false imprisonment brought against him; but if the defendant be arrested on a *ca. sa.* on the ninth day of *February*, which is the very day the writ was returnable, the arrest is good. 3 *Cro.* 180, 408. *Moor* 711. *Sid.* 229. *Vide Salk.* vol. 3. page 46.

Trinity, 7 W. 3. Wilson v. Tucker. An arrest on a Sunday is void arrest, and an action of false imprisonment lies against the officer, at the suit of the party arrested. *Vid. Salkeld*, vol. 1. p. 78.

Bail may take the principal on a Sunday and confine him till Monday, and then render him, it being deemed no serving of process. The same where the sheriff arrests a defendant on a Saturday and he escapes, he may take him on a Sunday, it being only a continuance of the former imprisonment. *Med. cases*, 231.

Michaelmas, 7 W. 3. The King v. Kendal and Roe. On a *habeas corpus* directed to the keeper of *Newgate*, he returned, that the defendants were committed to his custody, by a warrant from Mr. Secretary *Turnbull* for high-treason, in aiding and assisting Sir *J. M.* to escape, who was committed

mitted to the custody of a messenger on suspicion of *high-treason*, &c.

Exceptions being taken to this return; *Holt*, chief justice declared, that at *Norwich* assizes it was ruled by *Hale*, chief justice, that if a justice of peace directs a warrant to any particular private man, he may execute it and *arrest* the party, and well justify the execution, in an action of false imprisonment; and further, that the *Tower* was considered by the law, and really was a prison, within the *habeas corpus* act. *Gibbon's case*. *Vide Raym.* vol. 1. p. 65.

Easter 8. W. 3. Anonymous. Where a *capias* is awarded against *W. R.* and a *common bailiff* knows the writ to be in the hands of the sheriff:

Per Holt, C. J. He may *arrest W. R.* without actually having the warrant. *Vide Salk.* vol. 3. p. 46.

Mich. 9. W. 3. Brown v. Burlace. In this case it was held, that the *Temple* is *extra-parochial*, and not within any parish, nor within the city of *London* so as to come within the *customs*, but within the county of the city; and that the *White-friars* was within the jurisdiction of the city.

Dugdale and *Stow* say, that the *Temple* is privileged from *arrests*, by the grant of the king.

Per Holt, C. J. If the king has made such a grant it is void, because the *Templars* have no court of justice within themselves; yet the court inclined not to countenance *arrests* in the *Temple* in term time; but would not set aside the arrest of the defendant, who was *arrested* in the *Temple*; and therefore he was held to special bail. *Digest of adjudged cases in K. B.* page 110.

Michaelmas 10 W. 3. Savil v. Roberts. The case of *Chamberlain v. Prescott* being cited in the above cause, *Holt, C. J.* said, that he had a manuscript report thereof drawn up by *Bridgman*, chief justice of C. B. wherein the case is thus stated. C. brought an action on the case against P. in which he declared that the defendant P. caused him *falsely* and *maliciously* to be indicted on the stat. 8 Eliz.,

8 Eliz. cap. 2. for having caused C. to be *arrested* at the suit of S. without his consent, of which he was acquitted, &c. After verdict for the plaintiff, it was moved in *arrest of judgment* in the *king's-bench*, and judgment was entered for the plaintiff. On which *error* was brought in the *exchequer chamber*, and after the restoration that case had a great debate; and the judgment of the *king's-bench* for maintaining of the action was reversed. *Bridgman*, chief justice, was against all such actions. But it appears by his report, that this was not the reason of the reversal of the judgment, but because C. was *indicted* for what was no offence at all; for, in fact, P. *arrested* C. in his own name, and the name of S. for a debt due to them *jointly*, which was lawful without the consent of S. and if S. did not appear, if it were in a *personal* action, he might be *non-suited*, if in a *real action*, summoned and seised; and therefore it was held to be no offence. *Vide Raym. vol. 1, page 380.*

Trinity 12 W. 3. K. B. *The King v. Fowler*. The defendant was *arrested* on an *excommunicatione capiendo*. The *significavit* expressed, that the defendant was excommunicated for *contumacy* in a suit, for withholding tythes, and other ecclesiastical dues. The defendant brought his *habeas corpus*, directed to the sheriff of the county, &c. or to the gaoler who returned the *warrant* of the sheriff on the *excommunicatione capiendo*, &c. The counsel for the crown took *exception* to the return, that as it appeared on the recital of the *significavit* in the warrant, the defendant was excommunicated in a suit for tythes or ecclesiastical dues in the *disjunctive* and therefore ill, because the cause of excommunication should appear to be sufficient, and the *specialty* of it ought to be shown. For perhaps the ecclesiastical dues may be such as he was not obliged to pay. Excommunication so generally pleaded, without some other special cause, will not be sufficient to stay another's suit. 8 Co. 68, 6 *Trollop's case*; and the *King v. Sanchez* was cited, where on a writ of *habeas corpus* the defendants were returned, committed by a warrant of two justices of peace in pursuance of stat. 27 Hen. 8. cap. 20. for *contumacy* in a suit before an ecclesiastical judge for tythes or other ecclesiastical dues, and on the same *exception* as in this case, the defendants were discharged. The court

gave no opinion in this matter: but *Holt*, chief justice, said, that *Sanchoe's* case differed, because the commitment there was by virtue of a *special* authority given to the *justices of peace* by the said act, which ought to be pursued strictly. But the court quashed the *habeas corpus* for two reasons, 1. because it was directed to the sheriff or gaoler in the *disjunctive*, which the *clerks* agreed was contrary to the practice of the court.

2. Because the writ of *excommunicatione capiendo* was not returned, but only the warrant of the sheriff; for the writ ought regularly to be returned; for may be it is right; for if the sheriff has a good writ against a man, and he makes an ill warrant to his *bailiffs* on it to *arrest* the man, and they *arrest* him accordingly, tho' the bailiffs cannot, yet the sheriff may justify by virtue of the writ, for if the sheriff be in any manner privy to the taking, as if he commands his *bailiffs* to *arrest* a man by *parol*, when he is taken accordingly, he is in the custody of the sheriff: and if he has a writ against him at the time he is *arrested*, he is in custody by virtue of the writ. Indeed the sheriff must be privy to the taking, or otherwise he cannot be in his custody.

Holt, chief justice, said, that the carrying of this writ to the gaoler was an irregularity; for where a man is committed immediately to the gaoler, there the *habeas corpus* ought to be carried to him; but where he is arrested by virtue of a warrant on a writ directed to the sheriff, there the *habeas corpus* ought to be carried to the sheriff; for he having the writ in his custody is the only proper person to make the return. Since the *habeas corpus* act, the gaolers have taken on them to cheat the sheriffs of the money for the returns, but that is not regular. The writ was therefore *quashed*, and a new *habeas corpus* granted, returnable *immediately*; on which the court gave order, that they should procure the writ to be returned. In *Michaelmas* term following, the court was moved that *Fowler* might be discharged, as the case was uncertainly shewn in the writ.

Holt, chief justice, sufficient cause ought to appear, because the *king's courts* are judges of their jurisdiction, and not themselves; and therefore they ought to shew, that
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the matter was within their *conuizance*. And for this reason doubtless the *significavit* is ill, and therefore the defendant may in *chancery* procure the writ to be superseded. But the *king's-bench* cannot deliver a man *arrested* on the king's writ, because the *chancery* have granted it, where they ought not to have granted it. If the certificate be ill, the *chancery* ought to *supersede* it; but the *king's-bench* cannot proceed on it, because it is not before the *king's-bench*, for the *king's-bench* cannot give judgment on a *recital*, where another court is possessed of the original. In error brought on a judgment of C. B. in debt an *exception* was taken, because the writ, as it was *recited* in the declaration, was *attached* where it ought to have been *summoned*, and therefore ill; but the court refused to allow the *exception* to be taken, because the writ was not before this court, but only by *recital*; but it was held, the *diminution* ought to be alledged, and a *certiorari* sued out; and if on that an original was returned, which ran *attached*, the judgment should be reversed.

The great doubt was, whether this uncertainty in expressing the cause would vitiate the writ, and then whether the court would quash it; and in proof of the affirmative, *Moor* pl. 667. *Cro. Jac.* 556. *Cro. Car.* 196, 199. *W. Jones* 226. *Hil.* 29. and 30 *Car.* 2. *B. R. Rex v. Price.* 1 *Roll. rep.* 136. and *T. Jones*, 89. were cited.

After several arguments on different days, and on great consideration and search of *precedents*, it was resolved that the writ should be *quashed*, and a *superfedeas* issue. *Holt*, chief justice, said, that at *common law*, the cause had no need to be shewn in the writ of *excommunicatione capiendo*; but it was sufficient to say, that the party was *excommunicated* for a manifest contempt. *Regist.* 65, 7. But in the *significavit*, it ought to be shewn, *Fitz. Nat. Bre.* 63, 4. And now since stat. 5 *Eliz. cap.* 23. the cause ought to be shewn in the writ. The statute makes the writ returnable here, on purpose that this court should judge of the cause, otherwise it had been idle to make the writ returnable here, and especially when the process ought to differ, according to the difference of the cause for which the *excommunication* was. As to the nine causes mentioned in the

the act, an *alias* ought to issue, with a penalty, &c. Then this court being possessed of the writ, and it not expressing the cause *specially*, but in the *disjunctive*, the writ ought to be *quashed*. Before this statute they ought to have resorted to the *chancery*, and procured a *supersedeas* there. 2 *Inst.* 623. But that cannot be done now, because the writ is returnable here. But because the cause is shewn insufficiently out of the writ, it ought to be *quashed*, and a *supersedeas* awarded. But a *habeas corpus* is a very improper method to discharge the party, for he is well arrested by virtue of the king's writ, and cannot be discharged whilst that is in force. And it is a good return to the *habeas corpus* to say, that he is in custody by a writ of *excommunicatione capiendo*.

Gould, justice, said, That before *Stat. 5 Eliz. cap. 23.* this court could not discharge a man taken on an *excommunicatione capiendo*, unless he was *excommunicated* pending a *prohibition*. And he agreed that this court had power to *quash* the writ, and award a *supersedeas*, where the cause is not sufficiently expressed; but he made a doubt, whether there was here such uncertainty, for the *five*, i. e. or seemed to him to be *accumulative*.

On the opinion of *Holt* and *Turton*, justices, the writ was *quashed*, and a *supersedeas* granted; and *Holt* ordered the clerk to enter on the *habeas corpus*, that the party was discharged, because the writ was *quashed*; and said, in this case, that if the writ had been for withholding certain *ecclesiastical dues*, it had been well. But he said also, that this statute was not well understood until the time of *Charles I.* in *Hughe's case*, *Cro. Car.* 196. and that the form of the proceedings in the *spiritual court* ought to be regarded as in a *libel* for words; their form is to say, that he spoke such words, or others to that effect, and yet a *prohibition* was denied to be granted for the said cause. *Vide Raym.* vol. L. p. 586, 618.

Easter, 1 Ann. Atwood v. Burr. *Holt*, chief justice. If a window be open, and a bailiff put in his hand, and touches one against whom he has a *warrant*, he is thereby his prisoner, and may break open the door to come at him. *Vide Digest of adjudged cases in K. B.* page 111.

Michaelmas,

Michaelmas, 1 Ann. Post Denning v. Close. On a *plaint* levied in an *inferior court*, before the debt contracted, and the party *arrested* thereon.

Per curiam. This *arrest* is ill. *Ibid.*

Hilary, 2 Ann. Lidford v. Thomas. The defendant's counsel moved to have him discharged out of custody, for that he had been *arrested* on a *Sunday* by process out of this court, but in truth it appeared that he was taken without any warrant on a *Sunday*, and kept locked up till *Monday* morning, and then a writ was procured.

Per curiam. If you are imprisoned without a warrant, you have your remedy by action for false imprisonment, but then let them shew cause why an attachment should not go against them.

Gould, justice, said, That attachments have gone frequently in such a case, and it was so ruled here.

Holt, chief justice, said, That after the arrest the bailiff ought to carry the party to the next *gaol*, if he does not desire to be carried to a particular place, to send for his friends. *Ibid.*

Hilary, 2 Ann. Garibaldo v. Cagnoni. The plaintiff came into court to confess an indictment for an *assault* on C. and as he was going home, C. got him *arrested* for the same *assault*, and on motion and on an *affidavit* of this matter, an attachment *nisi* was granted against him, and before the day he discharges G. and on shewing cause, the rule was discharged, because the *affidavit* in support thereof did not charge him to have notice that G. came to court to confess the judgment, for otherwise he could not be in *contempt* for the *arrest*. *Vide Mod. Rep. vol. 6. p. 90.*

Trinity, 3 Ann. Powel v. Ball. If a bailiff has a warrant to *arrest* a person, and another hinders him from doing it, there being no actual *arrest*, it is not a *rescous* but a *contempt* of court. *Ibid.* page 112.

Trinity,

Trinity, 3 Ann. Genner v. Sparks. G. a bailiff, having a warrant against S. came to his house, and finding him in the yard, told him he had a warrant for him, and pronounced the words of *arrest*, but did not lay his hands on him; whereon S. snatched up a pitch-fork, and kept off the *bailiff*, threatening to kill him if he came near him; and thus *retreated* into his house, and shut the door against the bailiff. These circumstances appearing by an *affidavit*, the court was moved for an attachment on the matter against S. supposing this to be a *rescue*, or at least a great contempt of the Queen's writ.

Per curiam. Here was no *arrest*, the bailiff not having laid hands on the defendant, for his shewing the warrant, and pronouncing the words of *arrest*, without touching him, was no more an *arrest* than it would be one, if a bailiff sees a man look out of a window, one or two pair of stairs high, and tells him he has a writ for him, and says that he *arrests* him; and therefore, in such case, the bailiff cannot break the house to come at the person, as he could lawfully do if he had been his prisoner, and had escaped into a house from him. But it was agreed, if here he had but touched the defendant, even with the end of his finger, it had been an *arrest*, and he might have broke the house after to seize him, and an *attachment* might go for the *rescue*: as if a bailiff has a warrant against a person, who is in a house, and lays his hand on him through a window, he may afterwards break the house to come to him. It was likewise agreed, that the bailiff had the protection of the law, and therefore if he had ventured on here, and had been killed by the defendant, it had been murder in him; or if the defendant had beat or hurt him, he might have had his action: or in this case, if the defendant were within reach of the bailiff when he pointed the pitch-fork at him, he might have had his action of *assault* against him; so if he had presented a gun at him, at such a distance as the shot would reach him. Therefore the court denied the motion. *Ibid.*

Easter, 4 Ann. Luttin v. Benin. On an action for an *escape*, brought against a *Serjeant at mace* of *Wood-street Compter*, to which he pleaded not guilty;

It

It appeared on evidence at the trial, that the action on which he *arrested* the person who escaped arose out of the *jurisdiction*, and the process was executed out of the *jurisdiction*.

The defendant's counsel said, where an *inferior court* holds plea of matters out of their *jurisdiction*, it is *not before the court*. There is a difference between proceeding *erroneously* where they have *jurisdiction*, and where they have no *jurisdiction*. *Cro. Car.* 394. *Hardress* 480. That actions will lie against officers, appears from the *averment* necessary for the officer; *viz.* that the cause was *within the jurisdiction* in order to justify: And if an *inferior court* holds plea of a matter out of their *jurisdiction*, all their proceedings are void, and the matter is *not before the court*, and may be avoided by plea. *March* 117. 3 *Lev.* 243. But where they have no *jurisdiction*, no action will lie. 3 *Lev.* 234, 28. 1 *Roll. Abr.* 809. That actions may be brought against the officer, as well as against the plaintiff. 2 *Mod.* 195. 2 *Cro.* 3. *Sir T. Jones* 214. 4 *Rep.* 14. 6. 2 *Lutw.* 935, 1516. 2 *Mod.* 30. *Cro. El.* 836. *Hob.* 267. 1 *Vent.* 86. If a man brings an action in an *inferior court*, as in the *star-chamber*, an action will lie; and so where a man sues a matter not before the court. *Lev.* 95. 1 *Sid.* 125. it not being in the ordinary way of justice, that no action of *escape* will lie in this case. 1 *Roll. Abr.* 547. *March.* 8. 2 *Bulst.* 69. 2 *Mod.* 29.

The plaintiff's counsel, in support of his case, cited 2 *Inst.* 230. 3 *Keb.* 852. 2 *Vent.* 236. *Raym.* 189. 26 *Ed.* 3. 16. This being a matter *transitory*, and the court having in the *first instance* a *jurisdiction*, no one shall take advantage of it. *Yelv.* 42. 2 *Cro.* 3. but the defendant, 2 *Bulstrode* 62. and it shall be at his election, to avoid it by plea, or not; and the defendant in this case is a *wrong doer*, and so shall not take advantage of his own wrong. He said that in the city of *London*, they never say the cause of action arose within the *jurisdiction*, as they must within all other *inferior jurisdiction*. A *sheriff* cannot take advantage of any erroneous proceedings if he suffers an *escape*.

As to the limitations of *inferior jurisdiction*, *Holt*, observed, that there were three things to be considered, *viz.*
persons,

persons, time, and place. As to persons and place, as in the case of the *Marshalsea*, and those of the household; for in that court they have *jurisdiction* only in debt, trespass, and covenant; and therefore should they hold plea of an action on the case, it is plain they have no *jurisdiction*. And as to things, he said the city have *jurisdiction* in all causes, and are only restrained to place; and therefore the defendant ought to have pleaded to the *jurisdiction*. For if he admits of the *jurisdiction*, he is for ever estopped; and an issue may be taken on it; and if it be found to arise within the *jurisdiction*, final judgment ought to be given. If a man is wrongfully brought into a *jurisdiction*, and there lawfully arrested, yet he ought to be discharged; for no lawful thing, founded on a wrongful act, can be supported. If a justice of peace makes an order for a man to keep a bastard child, which in reality was born two days after marriage; in this case all the officers acting under it are wrong, and they are liable; because a justice can have no *jurisdiction* of the thing. But in this case, the court had *jurisdiction* of the thing, and therefore it ought to have been avoided by plea.

Powel, justice, was of the same opinion; and said, where an inferior court had *jurisdiction* in a transitory action, the defendant ought to plead it, otherwise it does not appear, but it did arise within the *jurisdiction*; and to make it not before the court, it must appear that the court have no *jurisdiction*.

Powys and Gould, justices, concurred.

Per curiam. Judgment for the plaintiff, nisi i. e. unless the defendant shew cause within a week. *Ibid.*

Easter 5 Ann. The sheriff of Middlesex's case. A writ issued out of the court of king's bench to the sheriff to arrest a man; and the sheriff returned, that the man had insisted, according to the Stat. 4 & 5 Ann. cap. 10. and therefore I cannot take him.

The court was moved against the sheriff, for not having arrested the man; because by the act, the plaintiff had liberty to go on to judgment and execution, against any thing

thing but the defendant's body, and then the court would discharge him on *common bail*, if he appeared to them to be enlisted regularly; but the sheriff should not take on him to determine whether he was regularly enlisted. But the court on consideration held it to be a good return, and that this act worked by way of a *superfedeas* to any process to be issued against persons enlisted, and that if the sheriff should enlist such a person, he would be liable to an action of *false imprisonment*. And they said it appeared, that the act did not intend that the man should be arrested, and then discharged on *common bail* by the proviso, "that the plaintiff " on leaving notice in writing at the defendant's last place " of abode, or giving to the defendant such notice in writing of the plaintiff's cause of action, might file common " bail for the defendant, and proceed to judgment, &c." That in case the man was not fairly and regularly enlisted, this was a false return; and the plaintiff had his remedy against the sheriff, by an action for the *false return*. *Ibid.* page 113.

Trinity 8 Ann. Case of Andrew Artemonowitz Mattuef, the Russian Ambassador. The question was; whether an ambassador could by law be arrested for debt?

The attorney general argued as follows.

He cannot. If the privileges of an ambassador may be broken in on, and invaded for the preservation of the property of a private subject, and this is declared to be law, princes will be cautious of sending ambassadors to us; ours must expect the like treatment, and few will be prevailed on to assume that character.

Should an ambassador be liable to the restraints of the law of the land to which he goes, how easy would it be on any emergency, to take off his attendance on his master's business. The law of *England* privileges the body of a member of parliament, and of a soldier, and shall it not that of an ambassador?

The person of an ambassador has ever been held sacred and inviolable by the law of nations.

The

The goods of an ambassador are not liable to distress, *a fortiori*, nor his person. An ambassador must be intreated, and on refusal, sent back to his master. If an ambassador commits an enormous crime the king, from whom he is sent, not the king to whose court he is sent, must punish him.

Lord Coke says, *to violate the person of an ambassador*, is a violation of the law of nations; nor does he add (as certainly he would, had he thought so) that though this be so in the *civil law*, it is not so in ours. An ambassador, by fiction of law, represents the person of his master. Thus Coke on statute 25 *Edw. 3.* affirms it high treason at the *common law*, to kill an ambassador. Now certainly no body will say the *Czar* himself might have been *arrested*. The same fiction of law that makes him represent the person of his master, makes him *extra parochial*, and, as it were, in the dominions of his master. The ill treatment of ambassadors is a thing of dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever. It was replied by the counsel on the other side: If this be so, a subject may be left without remedy for the recovery of his debt, which would be a defect in law.

Justice ought always to be reciprocal; but an ambassador may *arrest*; *ergo*, &c.

It is a maxim in law, that the royal prerogative does no wrong, and shall the prerogative of an ambassador surmount that of the crown?

Such a law as this would be a nullity, because contrary to *magna charta*, cap. 29. *we will not sell, deny, or delay justice to any one.*

An ambassador by his contract, renounces his privilege so far as to subject himself to the laws in force in that country where the contract was made.

This suit occasioned an act of parliament, 7 *Ann. cap. 12.* whereby all proceedings against the ambassador in this cause were rendered null and void, and the privileges of ambassadors

sadors fully settled as to this matter. *Digest of adjudged Cases in K. B.* page 113.

Michaelmas 3 Geo. Johnson v. Louth. The question was, whether a *gunner* was within the late act of parliament, that orders those listed as soldiers to be discharged from *arrests* for debt.

The plaintiff's council *objected*, that they were not within the act, because they were *warrant officers*, and took a particular *oath*, and because the makers of this act of parliament, seemed apprehensive that they would not have been liable to the same punishment, in case of mutiny and desertion, as other soldiers, unless they had by an express *clause* made them so.

He likewise *insisted*, that the design of the act, being to encourage men to enter into the king's service, must not be extended to such in the army, whose pay is so considerable as this alone to be a sufficient inducement. The pay here was 1s. 4d. per day.

Per curiam. As to the clause in the act relating to *mutiny* and *desertion*, the act only supposes it possible, that there might be a doubt, and therefore resolves to make every thing clear, where the punishment to be inflicted is nothing less than *death*.

But the act of parliament resolves the doubt, as we do now, that he is a *soldier*.

The matter does not turn on the *quantum* of the pay, if it did, a *trooper* would most certainly be out of the act, whose pay is much more considerable than that of a *gunner*, and who generally gives a good sum of money for his place,

The reasons why a *gunner's* pay is more considerable than that of a *soldier*, are 1st, in respect of their skill, and 2dly, the hazard they run, both which considerations render their service more necessary, and make it more reasonable, that they should not be taken away from the service. The court therefore discharged the defendant from his *arrest*. *Ibid.*

Trinity 10 Geo. Croffe v. Talbot. A motion was made on behalf of the defendant to set aside the bail bond given on the *arrest*, and that common bail might be accepted, and he obtained a rule to shew cause. His affidavit shewed that he was *valet de chambre* to *Monsieur Hoffman*, the duke of *Holstein's* resident here, at 12l. 12s. *per annum* wages, and 10s. a week board wages, and a certificate thereof was produced, under the resident's own hand; but it did not appear, that he either lodged in the house, or actually executed the office. The court held, that he ought to be a domestic servant, and really to execute the duty of his office, and that being a meer nominal servant was not sufficient, and discharged the rule.

A great many cases have been since determined on the same principle but it has in those cases been held; that the idea of a domestic servant is not confined to his lying in the foreign minister's house, provided he is a real servant, and actually performs the service. *Ibid.*

Michaelmas, 11 Geo. Henley v. Rosse. The defendant was *arrested*, and no declaration being filed against him within *two terms* after the *arrest*, he procured a *superfedeas*, and was discharged, and immediately after he was *arrested* again by a *capias* out of the *common-pleas*, at the suit of the same plaintiff, and for the same cause of action, on a motion to discharge the proceedings because irregular.

Per curiam. The defendant had a right to *superfede* the action, because no declaration was filed against him in time; and as he had a right to *superfede* the action, certainly the plaintiff must have liberty to proceed in another; for his *debt* is not lost for want of declaring in time, but only that action is gone, and therefore a *new* action may be brought. *Ibid.*

Michaelmas, 7 Geo 2. Holmes v. Gordon. The defendant's Council moved on *Statute 7 Ann. cap. 12.* to discharge the execution against the defendant, as being a servant of baron *Hopman*, resident from the duke of *Mecklenburg*; the defendant being a menial and domestic servant to the baron, and having continued in his service

to the time of the *arrest*, and a certificate of his being a servant to the baron being registered in the secretary's office, and also in the sheriff's, according to the statute.

Probyn, Justice. No mention is made of what capacity he served in. G. swears he was an officiating servant; but it is usual to set out what office he serves in, the affidavit is very loose: but the court granted a rule to shew cause. *Vide cases Temp. Lord Hardwicke, p. 3.*

Michaelmas, 8 Geo. 2. Shergold v. Holloway. A justice of peace granted his warrant, directed to the defendant in these words, "whereas complaint is made to me, on the oath of J. W. that W. S. refuses to pay him wages; these are to require you to cause the said S. to *appear* before me, or some other Justice, to answer the complaint aforesaid, and give notice to the said J. W. before what justice you appear."

On this the defendant *arrested* the plaintiff, and carried him before the justice, who bound him over to the sessions; on which the plaintiff brought his action, and a case being made at the assizes, the same was argued above, and these points resolved.

1st, That though the statute 5 *Eliz. c. 4.* does not expressly impower justices to order the payment of wages; yet they have been so long indulged with this power by the courts, under the general power of settling the rate, that it is not now to be disputed.

2dly, That a justice has no power to grant a warrant to *apprehend* the party. He can only issue a summons, and that a warrant expressly to *arrest* the party, will not justify the officer, there being no pretence for such a jurisdiction.

3dly, That this though strangely worded, was not a warrant to *arrest* the plaintiff; for the defendant might cause him to appear by *distress*, and it was not equivalent to the words, *bring before me*; wherefore judgment was given for the plaintiff. *Digest of adjudged Cases in K. B. page 114.*

Trinity, 9 Geo. 2. Williams v. Jones and others. In trespass for entering the plaintiff's yard, and breaking and entering his stable, and carrying away divers goods and chattels; viz. seven horses; and for an assault, battery, and imprisonment of the plaintiff. The defendants, as to breaking and entering the plaintiff's stable, justify, for that the plaintiff detained in his stable seven horses or geldings of the defendant Jones, who at a court of our lord the king, in his *Compter*, holden before Sir J. S. then sheriff of London, according to the custom of the city, levied a plaint for detaining the said goods; and afterwards the said sheriff commanded C. another defendant, who was a serjeant at mace, and a minister of the said court, to appraise the said goods, and to return them to Jones; and the said serjeant at mace, and the defendant as his assistant, entered into the said yard, which was the only way to the said stable, and took the horses, and delivered them to the defendant Jones. And as to the assault, battery, and imprisonment, they justify also, for that the defendant Jones sued out a *capias ad respondend.* against the plaintiff, out of the court of common-pleas, directed to, and delivered to the sheriffs of London, whereupon the sheriff issued a warrant to the defendant C. one of the serjeants at mace, who by virtue thereof arrested the plaintiff, and detained him in custody six hours, at the request of the defendant Jones, who was plaintiff in the said writ, which is the same trespass and assault, &c. To which plea the plaintiff has demurred generally.

The council for the plaintiff, last term, took several exceptions to the first part of the justification; viz.

1st, For that the court holden before the sheriff is not said to be according to the custom.

2dly, That to return seven horses or geldings is too uncertain. *Allen 32. Moore v. Clisam.*

3dly, That it does not appear, that these horses, when taken, were within the jurisdiction of the sheriff's court, and precepts of inferior courts must be executed within the jurisdiction.

4thly,

4thly, That the plaint levied before J. S. Sheriff of London is bad; because the court will take notice there are two persons that are sheriffs. *Lambe v. Wiseman*, Hob. 70.

But all these exceptions were over-ruled.

Lord Hardwicke. The plea in these points is well enough; the levying the plaint according to the custom, goes to the whole: For it is not said to be done at any particular court, but before J. S. in the *Compter*: as to the uncertainty of the goods taken, that might have been a good exception, according to the case in *Allen*, in an action of *replevin*, but it cannot be said to be so void a plaint as that the officer cannot justify under it. As to the place where the goods are taken; the stable is said to be in London, and the goods said to be taken in the said stable. As to J. S's. being but one of the sheriffs, that is well enough, because he is said to be then sheriff, or one of the sheriffs, and it is alledged to be according to the custom; and the court is not necessary to be holden before both the sheriffs.

An exception was likewise taken to the justification of the assault and battery; viz. that a man may not justify a battery, by virtue of an arrest by process, unless it had been by resistance, or in his defence, &c. which should have been set out; and the court doubted on this exception, and ordered it to stand over until this term, when it was again argued.

The plaintiff's council, in support of the execution, cited *Co. Ent.* 304. b. *Thomson's Ent.* 316. 2 *Lutw.* 929. *Patrick v. Johnson*. That an arrest by gently laying hands on, is not a justification of a battery, 2 *Sid.* 46. b.

The council for the defendant, in support of the plea, cited *Salk.* 75. *Gerner v. Sparks*, 1 *Saund.* 13. *Skinner* 387. *King & Ux' v. Theobalds*, and 21 *Hen.* 7. fol. 29. The court took a further day to give their opinion; and then,

Lord Hardwicke. The question is, whether a battery of the plaintiff can be justified by shewing an arrest by lawful process? and on consideration of the cases, we are of opinion that a battery cannot be justified by shewing an arrest barely, but that in order to make it good, something further should be shewn, as that the defendant gently laid his hands on the person, in order to arrest, and did arrest him, as in the case of *Patrick v. Johnson*, 3 *Lev.* 403. tho' that way of plead-

ing has been doubted of; or else that the plaintiff made resistance, and was going to *rescue* himself, and by reason of that he beat him. There is no case in all the books, that says, that a *battery* may be justified barely by shewing an *arrest*, or that it is repugnant to plead *not guilty* of the *battery*, and to justify the residue of the *trespass*, by an *arrest*, or that it is repugnant to plead *not guilty* of the *battery*, and to justify the residue of the *trespass* by an *arrest*, the case in 2 *Lutw.* 394. is not so, for the repugnancy there is, pleading *not guilty to the assault*, and justifying by an *arrest*, and that is right, because an *arrest*, must necessarily be an *assault*, but is not necessarily a *battery*. The dispute in the case of *Patrick v. Johnson*, between the two reporters, *Lutw.* and *Lev.* has occasioned the doubt that has arisen as to this sort of pleading; the question then was, whether an *arrest*, by a *gently laying hands on*, might be a justification of the *battery*: *Levintz* held it to be good pleading, *Lutw.* thought it not so (and the court inclined that way) but he allows there are precedents of pleading it by a *gently laying hands on*. But neither *Levintz* nor *Lutw.* gave opinion that the *battery* can be justified merely by shewing an *arrest*, without shewing a *gentle laying hands on*, or a *resistance*, &c. As to what has been said, that every *arrest* admits a *battery*, because it cannot be without *laying on of hands*, and every *laying on of hands* is so, that is a mistake in the case of *Jenner v. Sparks*, which was cited to warrant the distinction, which it does not do; for the question there was, whether there had been a *rescue*; and the court held that there had not, because there had been no *arrest*, for the officer had not touched the defendant; and to be sure in that case there was no *arrest*, for the party was neither *touched* nor *confined*: But it does not follow that an *arrest* cannot be made without *touching* the person, for if a bailiff comes into a room, and tells the defendant *he arrests him*, and locks the door, that is an *arrest* for he is in custody of the officer. But supposing there was a *laying on of hands* in the present case, every *laying on of hands* is not a *battery*, for the party's intention must be considered; for people will sometimes by way of joke, clap a man on the back, and it would be ridiculous to say, that in every such case a man must justify, and may not plead guilty. The case of *Wilson v. Dodd* 2 *Roll. Abr.* 546. is directly in point, that a *gently laying hands on*, is not a *battery*. That case indeed favours *Lutwicke's* opinion, that

that a gently laying hands on is not a *justification*, because it does not admit a *battery*, therefore as an *arrest* is not a *battery*, this is not a *sufficient justification*.

Per curiam. Judgment for the plaintiff. *Vide cases Temp. Lord Hardwicke*, p. 298.

BAILIFFS, GAOLERS, &c.

What they are, and how they are to conduct themselves to persons in their custody, under the Statutes and the several rules of court made for that purpose.

Sheriffs' bailiffs, or bailiffs of *hundreds*, are under officers belonging to the sheriff, and are appointed by him in every *hundred*. They are to execute all writs directed to the sheriff, by virtue of the sheriff's precept or warrant within the *hundred*. They are likewise to collect post fines, fee farms of the king, &c. for the sheriff to attend justices of assize, gaol delivery, and justices of peace in every of their courts and sessions.

An ordinary or bum bailiff need not take the oath of allegiance and supremacy, or any other oath of office.

Bailiffs, being officers who are to execute the king's writs, are punishable in those courts out of which such writs issue by *attachment*, &c. for any misdemeanor in the execution of their office.

By Stat. 22 & 23 Car. 2. If any under sheriff, bailiff, serjeant at mace, or other officer, shall have in his custody any person by virtue of any writ, process, or other warrant, it shall not be lawful for such officer to carry any person to any tavern, alehouse, or public victualling or drinking house, without the consent of the person, so as to charge such prisoner for any wine, beer, ale, victuals, or other things, but what he shall call for of his own accord; and shall not demand or receive any greater sum than by law ought to be taken for such arrest; or waiting until such person has procured an appearance, found bail, agreed with his adversaries, or be sent to the proper gaol, nor taking any other reward for keeping the person out of gaol than what he shall freely give, nor take any other sum for each night's lodging, or other expences, than what

is reasonable, or shall be so adjudged by the next justice of the peace, or at the next quarter sessions; and shall not call the person to pay for any other wine, beer, ale, victuals, tobacco, or other things than what he shall freely call for. And every under sheriff, gaoler, and every person to whose custody any person shall be committed, shall permit the said person to send for beer, ale, victuals, and other food, where they please; as also to have such bedding or other things as they shall think fit, without detaining or paying for the same, nor shall receive of the said person any other fees for their commitment or discharges, or for chamber rent, than what is allowable by law, until the same be settled by three justices of peace, whereof one to be of the *quorum*, of each county, city, and town corporate; and for the city of *London* and counties of *Middlesex* and *Surrey*, the two lord chief justices and the lord chief baron, or any two of them, and the justices of the same in their several jurisdictions. And the lords chief justices, lord chief baron, and justices of peace, and all commissioners for charitable uses, shall use their best endeavours to find out gifts and bequests for the benefit of poor prisoners for debt; and send for any deeds, wills, writings and books of accounts, and any persons concerned therein, and examine them upon oath, to make true discovery thereof, and the same so found out to order in some way, that the prisoners may not be defrauded. These accounts of gifts and bequests bestowed upon the prisoners for debt, and the rates of fees, and the future government of prisons, shall be signed and confirmed by the lord chief justices and lord chief baron, or any two of them, and the justices of peace in *London*, *Middlesex* and *Surrey*, and by the judges for the several circuits, and justices of peace in their precincts, and registered by every clerk of the peace: and no other fees than shall be so established shall be demanded. And it shall not be lawful for any sheriff or gaoler to lodge prisoners for debt and felons together in one room, but they shall be kept apart, upon pain that they that shall offend against this act shall forfeit their office, and treble damages, to the party grieved.

By Stat. 2 Geo. 2. cap. 22. “No sheriff, under sheriff, bailiff, serjeant at mace, or other officer or minister whatsoever

soever, shall at any time or times hereafter convey or carry, or cause to be conveyed or carried; any person or persons by him or them arrested, or being in his or their custody by virtue or colour of any writ, process, or warrant, to any tavern, alehouse, or other public victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free or voluntary consent of the person or persons so arrested, or in custody; nor charge any such person or persons with any sum of money for any wines, beer, ale, victuals, tobacco, or any other liquor or things whatsoever, save that he, she or they shall call for, of his, her or their own free accord; nor shall cause or procure him, her or them to call or pay for any such liquor or things, except what he, she or they shall particularly or freely ask for; nor shall demand, take, or receive, or cause to be demanded, taken and received, directly or indirectly, any other or greater sum or sums of money than is or shall be by law allowed to be taken or demanded for such arrest, taking, detaining, or waiting till the person or persons so arrested, or in custody, shall have given an appearance or bail, as the case shall require, or agreed with the person or persons at whose suit or prosecution he, she or they shall be taken or arrested; or until he, she or they shall be sent to the proper gaol, belonging to the county, city, town or place where such taking or arresting shall be; nor shall exact or take any reward, gratuity or money, for keeping the person or persons so arrested, or in custody, out of gaol or prison; nor shall carry any such person to any gaol or prison within four and twenty hours from the time of such arrest, nor shall take or receive any other or greater sum or sums for one or more night's lodging, or for a day's diet, or other expences, than what shall be allowed as reasonable in such cases, by some order or orders to be made by the justices of the peace, at some quarter sessions to be held for such county, city, town or place where such arrest or taking shall be, who are hereby authorised and required, with all convenient expedition, to make some standing order or orders for ascertaining such expences, within their respective counties or precincts." And every sheriff, and other person intrusted with the execution of process, shall deliver a printed copy of the said clause to every bailiff or officer by them employed to execute warrants, and when such officer shall
give

give security upon his entering into office, shall require him to make it part of the condition, that he will deliver a copy of the said clause to every person whom he shall arrest by virtue of any warrant, and carry to any house, and permit him or any friend of his to read it, before any liquor or meat be called for; and in case any officer shall carry to any house any person in his custody, and permit any liquor or victuals to be called for, before such clause be read to or by the prisoner, such neglect, besides the breach of the condition of such security, shall be accounted a misdemeanor in the execution of the process.

Every sheriff, gaoler, &c. shall permit every person so arrested to send for beer or other food from what place they please, and also to have such bedding or other things as they shall think fit, without purloining or detaining the same, or requiring them to pay for the using thereof, or putting any difficulty upon them relating thereto. No fee shall be taken by any gaoler, &c. for any prisoner's commitment, chamber rent, or discharge, except what are now allowed by law, till such fees shall be settled by the lord chief justice of the king's-bench, the lord chief justice of the common pleas, and the lord chief baron of the exchequer, or any two of them, together with the lord-mayor and two of the aldermen of *London*, in respect of prisons within the said city, and by the said lords chief justices and lord chief baron, or any two of them, with three justices of peace for the counties of *Middlesex* and *Surrey* in respect of the prisons in the said counties: and the justices of the peace of every county for the prisons in each county, &c. at the quarter sessions are required to settle the same; and tables shall be made of the fees, and signed by the lord chief justices, &c. and justices of peace of *Middlesex* and *Surrey*; and the table of fees, in respect of the rest of the gaols, shall be signed by three justices of the peace attending at the settlement of the same, and shall be reviewed and confirmed, or moderated, and then signed by the judges of assize, together with three justices; and also rules and orders for the better government of prisons shall be made, and from time to time enlarged and amended by the courts in *Westminster-hall*, in respect of the prisons belonging to the said courts, as by the lords chief justices, &c. with the lord-mayor and two aldermen, &c. in respect of the gaols and prisons within the city; and by the

the lords chief justices, &c. with the three justices of peace, &c. in respect of the prisons within *Middlesex* and *Surrey*, and by the judges of assize, or one of them, an three justices of peace of each county, &c. in respect of the gaols within their circuits, &c. and duplicates of such tables of fees and rules shall be made and signed, and transmitted to the courts of king's-bench, common pleas, and exchequer, to be enrolled; and such of them as relate to gaols in each county, &c. shall be registered by the clerk of the peace without fee, and hung up in some public room in every gaol, and be resorted to by every prisoner; and after such table of fees are settled and confirmed, no gaoler, &c. shall demand or take of any prisoner for debt any other fee for his commitment, chamber rent or discharge, than what shall be allowed in such table of fees. The courts of *Westminster* shall every *Michaelmas term* appoint some day to enquire, whether such table of fees and rules be hung up in the several prisons, and whether the same be observed; and cause eight days notice to be given to the prisoners of the time appointed for such inquiry, and shall redress whatever they find neglected; and the judges and justices of assize and gaol delivery shall make inquiry of the matters aforesaid, at all assizes and sessions of gaol delivery, in respect of the gaols within their jurisdictions, and shall give in charge to the grand jury to inquire concerning the same. Upon the petition of any prisoner, complaining of any exaction by any gaoler, &c. to any of his majesty's courts in *Westminster-hall*, from whence such process issued, or under whose power such prison is, in the term time, or to any of the justices or barons of such court in the vacation, or to the judges of assize in their circuits, it shall be lawful for the court, &c. to hear and determine the same in a summary way, and to make such order for redressing such abuse, and punishing such officer, and making reparation to the party injured, as they shall think just, together with the costs of complaint; and such orders made by the said courts or any of the said justices, &c. shall have the same effect as any order of the said courts, and may be enforced by attachments under the seal of the courts, by direction of the justices, &c. making such order. The lords chief justices, &c. and all commissioners for charitable uses, shall do their best endeavours to discover the gifts and bequests

quests given for the benefit of poor prisoners, and may send for any wills, writings, and books of account, and any persons concerned therein, and examine them on oath, and settle the payment thereof, and lists of such gifts, &c. shall be hung up in some open room of the prison, to which the prisoner may have resort without fee, and shall be registered by the clerk of the peace.

By Stat. 32 Geo. 2. c. 28. sect. 1. No sheriff, bailiff, or other officer, shall convey any person, arrested by virtue of any process, to any public victualling or other drinking house, or to the house of such officer, or of any tenant or relation of his, without the consent of the person arrested, nor charge him for wine, victuals, or any other liquor or things whatsoever, save what he shall call for, nor shall cause him to call or pay for any other liquor or things except what he shall particularly and freely ask for; nor shall take any greater sum than is by law allowed for any arrest, or for detaining or waiting till the person arrested has given an appearance or bail, or agreed with the person at whose suit he is arrested, or until he be sent to the gaol belonging to the county or place where such arrest shall be; nor shall take any reward for keeping the person arrested out of gaol; nor shall carry any such person to gaol within 24 hours from the time of such arrest, unless such person refuse to be carried to some safe and convenient dwelling house of his own nomination within a city, borough, corporation, or market town, in case such person be there arrested; or within three miles from the place where such arrest shall be, if the same be made out of any city, &c. so as such dwelling house be not the house of the person arrested, and be within the county or liberty in which the person was arrested, and then it shall be lawful for such officer to convey the person so arrested, and refusing to be carried to such safe and convenient dwelling house, to gaol.

Every sheriff, under sheriff, and bailiff of any liberty, and the respective secondaries and clerks sitters in the counters in *London*, and all the persons intrusted with the execution of process, or who shall enter any actions, or make any warrant, or any writ or process, in order to have the
same

same executed, shall deliver a printed copy of the several clauses in this act relating to bailiffs, and other officers and persons employed under them to execute any process, or who shall arrest any person on any action entered, or otherwise within their respective sheriffwicks or jurisdictions, to every such bailiff, &c. and shall make it part of the condition of every security given to any such sheriff or under-sheriff, or bailiff of any liberty, by any bailiff or person employed to execute process, that every such bailiff, &c. shall shew and deliver a copy of the said clauses to every person he shall arrest, and carry to any public or other house where any liquor shall be sold, and shall permit every such person arrested, or any friend of him or her, to read over the same clauses, before any liquor or victuals be called for or brought to such person under arrest there; and in case any bailiff, &c. offend in the premises, every such offence, besides the breach of the condition of such security-bond, shall be deemed a misdemeanor in the execution of the process on which such person was arrested, and shall be punishable as such by this act.

By Rule, K. B. Easter, 15 Car. 2. No bailiff or sheriff's officer shall presume to exact or take from any person, being in custody by arrest, any warrant to acknowledge judgment, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto, which said warrant shall be produced when the said judgment shall be acknowledged; any bailiff or officer offending, to be severely punished. And no attorney shall enter up judgment, on a warrant of attorney gotten from any defendant under an arrest, otherwise than as aforesaid.

The following rules made pursuant to the *Stat. 2 Geo. 2.* For the relief of debtors, with respect to the imprisonment of their persons, are to be strictly observed by the marshal and his officers, and all the prisoners; and this and the following rules are to be fixed in the most public place in the aforesaid prison, for the inspection of the said prisoners. 1. The marshal to cause a pair of stocks to be kept up in the prison, for the punishment of such as blaspheme the name of God, swear or misbehave themselves.

selves. 2. The marshal shall not allow any illegal means of confinement of any prisoner on any pretence; not to confine any in the hole or strong-room, or other unusual place of restraint; nor use any other extraordinary means of confinement, unless the prisoner has been found actually attempting to break the prison, with an intent to escape; and if so confined may appeal to court, in *Term*, or to a judge in the vacation for redress. 3. The marshal is not to sue, or procure to be sued out, any *habeas corpus*, to remove any person from the King's-bench prison to the *Fleet*. 4. The marshal is not to turn any prisoner back from the common side, to the master's side, without reasonable cause, giving such prisoner three days notice of his intention to remove him, during which time the prisoner may appeal to a judge to prevent the same: and pending which appeal, the prisoner to be allowed his daily subsistence as before; and his share of the dividend, and other advantages to be reserved till it be determined. 5. If any prisoner die in the said prison, the marshal forthwith to give notice to the coroner, that he inquire how such prisoner came by his death. 6. The marshal to take care that no garnish, or other exaction be extorted from any of his prisoners, and that none be deprived of his share, dues and dividends, on any pretence. 7. The marshal to take care that the prisoners may have any beer, ale, victuals, or other necessary food, from what place they please; and have and use such bedding, linen, and other things, as they think fit, without purloining or detaining the same, or enforcing them to pay for the using them, or put any restraint upon them in relation thereto. 8. The marshal to cause a table of fees settled according to the aforesaid statute, these rules, and a list of all gifts and legacies, to be hung up in some public place in the said prison, to be resorted to by the prisoners, without fee or reward. 9. The marshal by legal means to prevent escapes, and he and his officers to treat the prisoners with the utmost tenderness and humanity, as far as consistent with the safe custody of them; and neither the marshal nor any employed by him, to take from any prisoner for debt, more for commitment, chamber-rent, release or discharge, than allowed in the aforesaid list of fees. 10. The turnkey diligently to attend the gate or door, and admit such persons to any of the prisoners, as by law are entitled thereto.

11. No cellarman, turnkey, or other officer or servant of the marshal, to have any share of the charities, or bear any office which may entitle him in the disposition or receipt thereof.
12. The chapel to be kept in good repair, and the chaplain to attend to perform the divine service, and administer the sacrament at the usual times of the church of *England*.
13. No prisoner to wrong another, on pain of being set in the stocks, for such time as the marshal, with the consent of the steward and assistants, or any two of them think proper.
14. The dining-room to be kept in repair, for the prisoners to exercise devotion or conversation, and a fire kept therein as the season requires; and the two rooms under it to be kept for the use of such as are afflicted with any disease or infirmity, that may require such accommodation.
15. Every prisoner who shall make oath before a judge, a commissioner, or a justice of the peace for the county of *Surrey*, that he cannot command 5*l.* and cannot subsist without the charities belonging to the common side, shall immediately be admitted to the common side, and be capable of being elected into all offices, and be entitled to all shares, dividends, and profits belonging to the same.
16. No person committed for criminal matter to have a vote or suffrage in electing a steward or other officer of the common side, nor to receive any share of the charities, other than his share of the profits arising from the baskets.
17. Every prisoner to lodge in a cabin within the ward to which he belongs, without fee or reward.
18. Every prisoner to be capable of being chosen in his turn an assistant, and be entitled to such allowances and advantages as have been customary.
19. The seal of the common side to be kept by the master of the king's-bench office, and not to be affixed to any receipt or other instrument, till approved and signed by the marshal, with the consent of the prisoners of the common side, signified under the hand of the steward and assistants.
20. If any prisoner on the common side be charged with one action, and it be supersedeable, the same to be superseded with the money belonging to the prisoners of the common side, by their consent, signified under the hands of their stewards and assistants, and signified by the marshal; but if charged with more than one action, not to be superseded with such money, unless by order obtained by application to the court in term-time, or to a judge in the vacation. And no judge's clerk to take

take any fee in any matter relating thereto. 21. Particular care to be taken of prisoners on the common side, when sick, necessities provided by the stewards and assistants, and they to be reimbursed out of the county money. 22. Debts reasonably contracted by the steward and assistants, with the concurrence of the marshal, and the master of the king's bench office, for the necessary support of poor prisoners, to be entred by the steward and assistants in their house-books, and to be repaid out of the next dividend. 23. No money to be allowed the steward and assistants for sitting on house-business, or adjusting differences between prisoner and prisoner. 24. Any prisoner that comes into prison, after the first day of *Easter-term*, to have but one quarter of the *Midsummer* dividend. 25. The money brought to the prison by the basket-men, and their boxes, and the boxes which come in at *Christmas*, *Easter*, and *Whitsuntide*, to be immediately divided between each prisoner, making the basket-men such reasonable satisfaction for their trouble, as has been usually allowed. 26. In case the marshal, in aid of the steward and assistants, advance any money for superseding any action against any prisoner, as before directed, he shall be reimbursed out of the next county-money. 27. Prisoners of the common-side have power to make an election of a steward every year; no prisoner who has the liberty of the rules, or liberty to go out of the walls of the prison, to have a vote for steward or other officer of the common side. The steward to continue in his office a year, unless removed upon application to the court in term, or a judge in the vacation. 28. The steward of the common side to keep a register-book of the fees aforesaid, and these rules, and of the charities which the said prisoners may inspect, and the steward's accounts. 29. If any prisoner be wronged or abused by the steward and assistants, on complaining to the court in term, or in a vacation to a judge, or to the marshal (on proof thereof) to have allowance for costs and charges, to be paid out of the next dividends belonging to the steward and assistants, or such of them who have wronged the person complaining; or if the complaint prove groundless, the complainant to make satisfaction out of his share of the next dividend. 30. If any of the assistants or steward mispend or waste the house-money, the next assistants, or any succeeding them, may call the former to account for the same; and on proof of

of money mispent call all dividends, as well at the grate as otherwise, to be taken, stopped, and kept for reparation, and to be put into the house-box; till divided to each prisoner. 31. The steward and assistants to cause these orders to be read every third *Monday* at the first basket, being the usual day for chusing the officers, and settling the house-account. 32. The marshal, his officers and servants, and the prisoners, to keep these orders, under penalty of the utmost punishment that by law can be justly inflicted on them. 33. No clerk, officer, or servant belonging to any judge of the court, to take any gratuity by reason of any petition, complaint, or application made to any judge by any of the said prisoners, pursuant to these orders.

By Rule Hill. 3 Geo. 2. CB. All the orders or rules hereunder written, established pursuant to the *Stat. 2 Geo. 2.* intituled, *An act for the relief of debtors with respect to the imprisonment of their persons*, to be kept as well by the warden and his officers and servants, as by all the prisoners. And this rule, with the rules aforesaid, to be fixed up in the hall of the prison, for the use and inspection of the prisoners. 1. The warden or deputy, to appoint so many of the household servants as either of them shall seem good, to open and shut the two outer gates, at such hours as the gates of *Ludgate* and *Newgate*, and the said persons to carry halbert, bills, or other weapons, as shall seem good unto the warden or deputy. 2. The warden or deputy to take order that no person carry any weapon further than the porter's lodge, unless licensed to keep the gate. 3. The warden or deputy, and so many of the household as needful, to keep watch in harness or otherwise, at all times as he shall see cause for his safe-guard. 4. The warden to order the money gathered at the box, or otherwise given for the distribution amongst them, if any contention arise; the poor men shall keep one key, and the other to be at the warden's appointment. 5. If the prisoners on the master's side refuse, or be unable to pay chamber-rent, then the warden may turn them out into the wards, but no prisoner to be confined for nonpayment of chamber-rent, but all to have liberty of walking in the fore-yard, hall, and cellar in the day time; the ward's-gate in the day time to stand open, and to be opened at

five in the morning in summer, and seven in the winter. And the warden may shut the ward-gates at nine at night in the winter, and ten in summer, provided he keep a watch to attend to let out and in, such as have occasion to go to the necessary-house. 6. The warden not to detain or imbezzle any prisoners goods, but may detain his person after discharged by his creditors, till the fees be paid. 7. The warden to provide a dungeon for persons that endeavour to escape, or are guilty of other great misdemeanor. (And after being informed that such a room was provided, for a further regulation ordered, that,) 8. The warden do keep the chapel in repair, and take care that divine service be performed, according to the use of the *church of England*, and all prisoners to attend, and not be absent without reasonable cause. 9. And no chaplain of the *Fleet*, or any clergyman, being a prisoner within the walls or rules, to presume to marry any person without licence, and the warden and officers to use their utmost diligence to prevent such marriages. 10. The warden to cause the stocks to keep up for the punishment of such prisoners as blaspheme, swear, or behave themselves disorderly. 11. No prisoner to take possession of any chamber, but with consent of the warden or deputy, or pull down any partition, or make any material alteration, without the consent of the warden or deputy, but the disposal of the rooms to be in the warden or deputy, yet so as neither of them turn any out of possession without cause, and prisoners on discharge to deliver to the warden, his deputy or chamberlain, the key of his chamber, and all the warden's furniture therein. 12. The warden or deputy may turn any out of his chamber to the common side, that refuse or neglect to pay chamber-rent for three months; and the warden or deputy shall in such case, take an inventory of the prisoner's goods and effects (if any) signed by two witnesses, and deliver them to such prisoner; but the warden may still detain the prisoner, though discharged by the plaintiff, or in any other manner until his arrears of chamber-rent be paid. 13. No person shall keep any public room, within the prison, for selling victuals or liquors, without leave from the warden, or his deputy; offenders may be turned to the common side, and the warden and deputy to take care that good order be kept in such public room, as shall be allowed, as aforesaid.

14. The

14. The warden to take care that every prisoner committed to his custody, be conveyed to the *Fleet*, without being carried to any public house, or the private house of any tipstaff, officer or minister of the *Fleet*, or of any tenant or relation of his, without the free consent of the person in custody, and no garnish shall be extorted by any prisoner from any person committed. 15. The warden to cause a table of gifts, expressing the purposes for which given, to be fairly writ, and hung up in the hall, and to take care that no prisoner be deprived of his share of the charities, or bear any office which may intitle him to the receipt or disposition thereof. 16. Every prisoner who shall make oath, before one of the judges of the court from whence the process issued, upon which he is taken or charged, or before a commissioner impowered by such court, that he is not worth 5 l. and cannot subsist without the charities belonging to the prisoners of the *Fleet*, shall immediately be admitted to all shares, dividends, and profits arising from such charities. 17. Two rooms marked 9 & 10, up in the chapel stairs, shall be kept as an infirmary for the prisoners on the common side, who fall sick of such diseases as require their being removed, and no prisoner shall be obliged to lie in a bed with a diseased person. 18. The warden shall keep the drains, bog-houses and dunghil as clean and free from noisomeness as possible. 19. When any prisoner dies within the prison, the warden shall forthwith give notice to the coroner, that he may inquire how he came by his death; and the warden shall detain the body no longer than the coroner's inquest have made their inquisition, which shall be done with all convenient speed; and immediately after the dead body shall be delivered to the prisoner's friends or relations, if they desire it, without fee or reward. 20. The warden not to sue out any *habeas corpus* to remove any prisoner from the *Fleet* to the *King's-bench* prison. 21. The warden shall keep a book, in which commitments shall be entered (*verba im*) within fourteen days after the prisoner is committed. 22. The warden shall keep another book of the names of every prisoner, at whole suit, and the time when brought to the *Fleet*, and the court or judge whereby committed. 23. Every tipstaff, to whom any prisoner shall be delivered at the judge's chambers, shall keep a book, containing the name of such prisoner, the time when taken into custody,

to be signed by such judge's clerk, who is to keep another book to be signed by the tipstaff. 24. The warden shall keep a book of all declarations delivered to the turnkey, containing the names of the parties, the cause of action, and the time when delivered. 25. The warden shall keep a book of discharges, specifying how made, whether by the plaintiff, by *superseas*, or otherwise; which entry shall be made within five days after every discharge. 26. The warden shall keep a book of every *habeas corpus* upon which the prisoner shall not be committed, or the custody altered, with the return of such *habeas corpus*. 27. All the books before mentioned, except the tipstaff's, shall be kept in the public office of the clerk of the papers; and all persons may resort to them and take copies. 28. No clerk, officer, or servant, belonging to any judge of this court, shall take any fee for any petition, complaint, or application made by any prisoner, founded upon these rules, or concerning any mis-government in the *Fleet*. 29. Lastly, The warden and his officers to treat the prisoners with all tenderness and humanity, and the prisoners to behave themselves towards the warden with that submission and regard which the law requires.

In the Common-pleas. A table of fees to be taken by the warden of the *Fleet* for commitments, or coming into gaol, or chamber-rent there, or discharged from thence in any civil action, settled and established the 19th of Jan. 3 Geo. 2. pursuant to an Act, for the relief of debtors in respect to the imprisonment of their persons.

Every prisoner charged with one or more actions (who at his own desire shall go to the master's side) to pay the warden for commitment, 1l. 6s. 8d.

Every prisoner charged with one or more actions (who shall go on the common side) not being entitled to partake of the poor's box, 13s. 4d.

Every prisoner entitled to partake of the poor's box, 1s.

Every prisoner to pay for his discharge, 7s. 4d.

Every

Every prisoner on the master's side, who, at his own desire shall have a bed to himself, to pay for chamber room, use of bed, bedding, and sheets, to the warden, per week, 2s. 6d.

If two in a bed, and no more, for chamber room, use of bed, bedding, and sheets, each to pay the warden, per week, 1s. 3d.

If the prisoner finds his own bed, bedding, and sheets, (which the warden is not to hinder him of) to the warden, per week, 1s. 3d.

Two prisoners in one bed, finding their own bed, bedding, and sheets, then each of them per week, *seven pence halfpenny*.

Prisoner not being entitled to partake of the poor's box, to pay the turnkey on commitment, 2s.

Prisoner on commitment upon a surrender at the judge's chambers, to pay to the tipstaff, 6s. 8d.

Prisoner on commitment on *Habeas Corpus*, at the judge's chambers, to the tipstaff, 4s. 2d.

On commitment in court, to the tipstaff, 7s. 6d.

No other fees for any prisoner for the use of chamber, bed, and bedding, or sheets, or upon commitment, or discharge of any prisoner entitled to partake of the poor's box, nor any chamber rent to be taken of any prisoner on the common side.

Points determined on the power and duty of the sheriff or his officers.

It is commonly said, a known bailiff need not shew his warrant, although it be demanded, nor a special bailiff without demand: In *London* it is said, the serjeant need not shew his mace, because he is sworn and known, although not to the party, 9 Co. 69.

And yet it is held a general arrest by a serjeant, by shewing his mace, and touching his body with it, by saying, *Sir, I arrest you*, is not sufficient, for he ought to shew at whose suit, out of what court, for what, and of what return the writ is, that the party may know what to do, *Bac. Abr.* 232. *Cro. Jac.* 485, 486.

Where the sheriff doubting a rescue, causes the serjeant at mace, to arrest one first on an action of 100 l. entered in *London* according to custom, and after the sheriff arrests him by *cap. ad satisfac.* this is unlawful, and the serjeant was severely punished, and the court disliked such feigned actions against law, *Dalt. Sheriff*, 110.

The sheriff must not dispute the authority of the court, though the process be erroneous. *Ventr.* 273.

If the officer comes to arrest a man, and he flies, the officer may pursue and take him in another county, but he cannot beat him, &c. because he was not arrested. *Lord Raym.* 231. 2 *Strange* 1049.

If after the arrest of the bailiff he flies, or draws weapons, he may. *Dalt. Sheriff*, 111.

Where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable. And on the other hand, if the party having authority to arrest or imprison, using the proper means, happens to be killed, it will be murder in all who take a part in such resistance. For it is homicide committed in despite of the justice of the kingdom.

The rule laid down, supposes that resistance is made, and upon that supposition it will, I conceive hold in all causes, whether civil or criminal, for in the case of resistance in either case, the person having authority to arrest or imprison, may repel force with force, and if death ensues in the struggle he will be justified. This is founded in reason and public utility. For few men would quietly submit to an arrest; if in every case of resistance, the party empowered to arrest, was obliged to desist and leave the business undone.

The case of bare flight in order to avoid an arrest in a civil proceeding, and likewise in some cases of a criminal nature, will fall under a different consideration. A defendant in a civil suit being apprehensive of an arrest flies, the officer pursues, and in the pursuit kills him, *this says Lord Hale will be murder.* *Hal. Hist. Pl. Cr.* 481.

Mr. Justice *Forster* rather chooses to say, it will be murder or manslaughter, as circumstances may vary the case. For if the officer, in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill*, and death should unhappily ensue, he cannot think that this will amount to more than manslaughter, or in some cases even to that offence. The blood was heated in the pursuit of *his prey*, a lawful prey, just within his reach, and no signal mischief was intended. But had he made use of a deadly weapon, it would have amounted to murder. The mischievous vindictive spirit, the *malitia*, i. e. *the malice* which always must be collected from circumstances, determines the nature of the offence. *Forst. Cr. Law*, 270, 271.

Something has been said briefly under the head of homicide in advancement of justice, touching the killing of officers in the execution of their offices, and of other persons having authority to arrest or imprison, or acting under colour of such authority. But this being a matter in which the justice of the kingdom is deeply concerned, I will now (says Mr. Justice *Forster*) submit to consideration my thoughts upon that subject more at large.

Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. For without it, the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things, will offenders of any kind be answerable to justice. And for these reasons, the killing of officers so employed, has been deemed murder of *malice prepense*, as being an outrage wilfully committed in defiance of the justice of the kingdom.

This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business which brought him thither; for he is under the same protection of the law *eundo, morando, & redeundo*, and therefore if he comes to do his office, and meeting with great opposition retires, and in the retreat he is killed, this will amount to murder. He went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger that threatened him. And upon the same principle, if he meets with opposition by the way, and is killed before he comes to the place, *such opposition being intended to prevent his doing his duty, which is a fact to be collected from circumstances appearing in evidence*, this likewise will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. *Forst. Cr. Law, 308, 309.*

The ministers of justice in civil suits, under proper limitations are entitled to the same protection for themselves and followers, and upon the same principles of political justice. *Ibid. 310.*

In the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority, and resistance is made, and the officer be killed, it will be murder; if in fact such notification was true, *and the process legal*. For after such notification, the parties opposing the arrest acted at their own peril. *Ibid. 311.*

A bailiff stood at the street door, and sent his servant up three pair of stairs, in a disguised habit with the warrant, who laid hands on one W. R. and told him that he arrested him. *Holt chief justice* doubted if this was a good arrest, being done by the bailiff's follower, or servant, and not in the presence of the bailiff himself; but said, that the plaintiff must prove his cause of action against W. R. and must prove the writ and warrant by producing the sworn copies of them. And he must prove the manner of the arrest, that it may appear to the court to be a lawful arrest; and in point of damages he must likewise prove the loss of his debt, viz. that W. R. became insolvent, or could not be retaken. *Vide Mod. Rep. vol. 8. p. 211.*

Bailiffs, Gaolers, &c. their Power and Duty. 57

If a bailiff having a warrant from a sheriff on a *capias*, send another in his room to arrest the person, such arrest is illegal. *Vide Mod. Rep.* vol. 12. p. 73.

A *capias* was returnable on *all souls* day, which was not a court day, the sheriff let the party go; the court said it was a bad return; the writ was good and the detaining the party on it lawful, and he was recommended to bring him into court. *Poph.* 205.

By Stat. 29 Car. 2. cap. 7. "No person upon the Lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace) but the service of such writ, &c. shall be void, and the persons executing the same shall be liable to answer damages, as if they had done the same without any warrant."

On a question before the court, whether serving an attachment for contempt on a Sunday, were within the above statute? The words being that all arrests on *Sunday*, except for breach of the peace are void. *Holt* chief justice said, suppose it were a warrant to take for forgery, perjury, &c. shall they not be served on *Sunday*? Sure the Lord's day ought not to be a sanctuary for malefactors! and this partakes of the nature of process on an indictment, but the court would advise thereon. *Vide Mod. Rep.* vol. 12. p. 348.

A warrant for good behaviour may be executed on a *Sunday*. *Vide Raymond*, vol. 1. p. 250.

If a bailiff arrests a man on a *Sunday*, since by the above statute all such arrests are unlawful, and the bailiff is killed in the making it, perhaps (says *Hawkins*) this will be manslaughter only. *Hawk. pl. cr.* 86. ch. 31. sect. 58.

On a motion to have a defendant discharged out of custody, for that he had been arrested on a Sunday by process out of the king's bench, but in truth he was taken without any warrant on a *Sunday*, and kept locked up till Monday morning, and then a writ was got. *By the court*: If you were imprisoned without a warrant, you have your remedy by false imprisonment; but then let them shew cause why

an attachment should not go against them. And it was said by *Gould*, justice, that attachments have gone frequently in such a case; and so was the rule here. *Vide Mod. Rep.* vol. 6. p. 96.

An arrest on a *sunday* is a void arrest, insomuch that the party may have an action of false imprisonment for it. *Vide Mod. Rep.* vol. 5. p. 95.

A defendant taken on a *capias ut legatum* on a *sunday*, moved to be discharged, the taking being contrary to *Stat. 29 Car. 2. cap. 7. sect. 6.* The court held the taking bad, but refused to grant an attachment, and put the defendant to take the remedy given by the statute. *Barnes Notes, C. P.* 228.

By *Stat. 5 Ann. cap. 9.* "Any person may be taken on the Lord's day by virtue of an escape warrant."

A prisoner escaped, and was retaken on a *sunday*, by virtue of a judge's warrant, called an escape warrant. The question before the court was, whether this taking was such a service of process as was against *Stat. 29 Car. 2. cap. 7.* By the whole court: This is a taking in nature of a fresh pursuit, and is no original process, and the gaoler or party might have taken him on a fresh pursuit on a *sunday* before this statute. *Vide Mod. Rep.* vol. 6. p. 95. *Raym.* vol. 2. page 1028.

The party is still upon the old commitment continued down. It was held, that this retaking is not within the meaning of the statute *29 Car. 2.* and that he might have been retaken on a *sunday* without a warrant, *6 Mod. 3 Salk. and 2 Lord Raymond.*

It was held otherwise in the C. P. and the two last books say, that the barons of the *exchequer* were equally divided, and that the like motion was made before in the same term in the K. B. and the court was then of the same mind. *Vide Raymond*, vol. 2. p. 1029.

The bail may take the principal on a *sunday*, and confine him till *monday* and then render him; and this is no serving of process, for the entry in the K. B. is, *he is delivered upon bail, &c.* it is rather like the case where the sheriff arrests the defendant on a *Saturday*, who escapes, he may take him

Bailiffs, Gaolers, &c. their Power and Duty. 59

on a *Sunday*, because it is only a continuation of the former imprisonment. *Vide Mod. Rep.* vol. 6. page 231. *Fortescus Rep.* 374.

The court was moved, that one arrested on a day of thanksgiving appointed by the parliament, was forced to put in bond to the sheriff for his appearance, might be discharged, and that the bond given to the sheriff might be delivered up. *Rolle* chief justice, advised the party to indict the bailiffs, who made the arrest, or bring his action against them, for we will not discharge the party arrested. *Styl.* 239.

It was said by *Richardson, C. J.* That, upon arresting a man upon *Christmas day*, going to church, in the church yard, he who made the arrest might be censured in the star chamber, for such an offence (this court is abolished by *Stat. 16 Car. 2. cap. 10.*) *Hetly* 19. *Godolph. Report.* Canon 115. *sect.* 12.

An arrest in the night as well as in the day is lawful, and as well at the suit of a subject as at the king's suit; for the officer or minister of justice ought to arrest him when he can find him, for otherwise perhaps he will never arrest him, *because he who has done amiss hates the light*, 8 *Co.* 37.

If the officer does not arrest him when he finds him, and may arrest him; the plaintiff shall have an action in the case, and recover all his lost damages. 9 *Rep.* 66.

If a writ is returnable on the *ninth day of February*, or *in eight days of the purification*, the defendant cannot be arrested by virtue of such writ, either on the *tenth* or *eleventh day of February*; though it is before the fourth day after. The *quarto die, post*, is only for the appearance and return of the writ, but not for execution. *Mo.* 701. pl. 998. *Cro. Eliz.* 760. pl. 33. If he is arrested, the officer cannot justify it either in trespass or *false imprisonment* brought against him. *Cro. Eliz.* 761. pl. 33. *Mo.* 711. pl. 998. *Keb.* 805. pl. 75. *Sid.* 229. pl. 27. *Lev.* 143. *Winch.* 76. A defendant taken on a *capias ad satisfaciendum* on the *ninth day of February*, which was the very day the writ was returnable, the arrest was adjudged good. 3 *Salk.* 46.

In an action of *trespass, assault and battery*, by special verdict, it appeared that the defendant, as bailiff of the sheriff, arrested the plaintiff, the *tenth* day of *February*, on a writ of *non omittas* out of C. P. which was returnable in *eight days of the Purification*, which was after the first or *essoign* day, but the days of grace to the return of the writ are *two days* after: and the court conceived, that although the sheriff may return his writ after, yet his office, as to arresting, is determined on the *essoign* day, which being no moveable feast, the court may take notice of the day of the month. *Keb. 718.*

The utmost length of time the law allows for executing a writ is the day on which it is returnable, and it is not executable that day any longer than the court sits. *Vide Mod. Rep. vol. 6, p. 130.*

Arrests ought not to be of persons going to or coming from church, in the church-yard, *Healy 19. Godolph. Rep. Canon. 115.* nor in the time of divine service, *stat. 1. Rich. 2. c. 15. 50 Edw. 3. c. 5. Cro. Jam. 602, pl. 6.* unless at the king's suit, *Cro. Jam. 321, pl. 4. Bulst. 72. Godolph. Rep. Canon. 141, sect. 8.* Holt, chief justice, said, he had known many attachments granted for arresting a man as he was going to church, to disgrace him, *Mod. 56, pl. 114. Wats. Clerg. Law, c. 34, p. 345.*

A person who is not privileged from arrests, by reason of his attendance on business, on some court of justice, or some other way privileged by some special rule or order of court, may be arrested in *Westminster-hall*, the courts sitting there; and it has been often done, for it is not the place but their business that protects the party. *2 Lil. Abr. 115.*

A person arrested in *Westminster-hall*, during the sitting of the court, may be discharged on motion, if the arrest was on mesne process, but not if he was taken in execution, for in that case the officer is punishable. *3 Salk. 46. Bulst. 85.*

One L. was arrested in the *palace yard*, not far from *Westminster-hall* gate, the court being then sitting; and being an attorney of this court, he together with the officer was brought

brought into court, and the officer was committed to the *Fleet*, that he might learn to know his distance; because the plaintiff was an attorney of the court of *king's bench*, who informed this court, that his cause of action was for 200l. therefore the court ordered, that another of the sheriff's bailiffs should take charge of the prisoner, and that the chief prothonotary, should go along with him to the court of *king's bench*, which was done; and that court being informed how the case was, discharged the defendant on filing common bail. The writ on which L. was arrested was an *attachment* of privilege, which the court supposed to be made on purpose to *arrest* him out of his privilege; for there was another writ against him at the sheriff's office, at the suit of another person. *Vide Mod. Rep.* vol. 2. p. 181.

If a person be arrested by the sheriff of the county, within a liberty, without a *non omittas*, yet the arrest is good, for the bailiff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff for entering of his liberty; but on a writ of *non omittas*, a sheriff may enter any liberty and execute it safely. *Lil. Abr.* 115. *Barnard K. B. Reports*, 282, 284.

On a motion that proceedings might be staid, on an *affidavit* that the arrest was made within the liberties of *London* on a bill of *Middlesex*. But the court said, that the *affidavit* was not sufficient, for the liberty of *London* may extend into *Middlesex*, though no part of *London* itself does. And *Page*, Justice, said, The borough of *Southwark* is within the liberty of *London*, though it lies in the county of *Surrey*. The same he said has been thought of the *Temple*, that it lies within the liberty of *London*, though out of the city and county. And accordingly the motion was not allowed. 2 *Barnard, K. B. Reports*.

A defendant was arrested in the *Temple*, and on a motion to set it aside, his council insisted, that the *Temple* is privileged from arrests by the king's grant. *Dugdale's Orig. Jur.* chap. 57, 70. p. 144, 310. edit. 1671. *Stow's Survey of London*, 271. edit. 1720.

Holt, C. J. If the king has made such a grant, it is void in law, they having no court of justice within themselves

selves there. It is true the *Temple* is *extra parochial*, and not within any parish, nor within the city, so as to come within the custom of the city, but it is within the county of the city; but the *White-fryars* is within the jurisdiction of the city: yet the court inclined not to countenance arrests in the *Temple*, especially in *Term time*, but would not set aside this arrest, so that the defendant was held to special bail. 3 *Salk.* 285. pl. 13. 45. l. 1. *Mod.* 155. *Skin.* 684. pl. 5.

The liberty of the *Rolls* is no privileged place, but as it is for all other courts *going and returning*. *Freem.* 689. pl. 474.

The *Cinque-ports* be *Hastings*, *Dover*, *Hithe*, *Romney* and *Sandwicke*, whereunto *Winchelsea* and *Rye*, and other towns be joined. 2 *Inst. c.* 7. p. 556. See *Jeake's Charters* of the *Cinque-ports*, 1728.

The privilege of the *Cinque-ports* extends only to the inhabitants, but not to strangers. *Freem.* 12. pl. 11. Nor where the matter or cause arises without the *Cinque-ports*. *Godb.* 90. pl. 102. *Brownl.* 34. Nor to an action of debt, or trespass transitory. *Cro. Eliz.* 910. pl. 22. *Yelv.* 12.

A defendant ought to be an inhabitant, otherwise trespasses committed within the *Cinque-ports*, by one who lived out of their liberty, or who would presently absent himself, would be punishable; and the reason of the privilege of the *Cinque-ports* is, that the inhabitants there, who are to defend the port-towns, should not be drawn away, which does not extend to strangers. *Freem.* 13.

When a stranger comes within the *Cinque-ports*, and does a *transitory trespass*, and afterwards goes out of their jurisdiction, he to whom the trespass was done may have an action at *common law*, else he would be without remedy; for they can call none in who are out of their jurisdiction, and the privileges were granted for the ease and benefit, and not the prejudice of the inhabitants. *Vide Yelv.* 2 *Inst. c.* 7.

By

By the charters granted to the universities of *Cambridge* and *Oxford*, bearing date respectively in the 4th year of the reign of king Richard 2. and the first day of *April*, in the 14th year of Hen. 8. both which were confirmed by Stat. 13 Eliz. c. 29. they may inquire of all trespasses, injuries, and of all pleas and quarrels, and of all other crimes and matters (except pleas of freehold). *Lit. Rep.* 252. *Cro. Char.* 87. pl. 9. *Vern.* 212. pl. 200. *Jenk. Cent.* 117. pl. 33. 3 *Salk.* 283. pl. 6. Where a scholar, their servants, or ministers, are one of the parties, and are to have cognizance and correction thereof, according to their statutes or customs, or according to the law of the kingdom of *England*, at the will of the chancellor; so that the justices of the *king's-bench*, or of the *common-pleas*, or the justices of assize, do not intermeddle; and if the said justices should presume to inquire, or in any matter take cognizance thereof, or intermeddle, that then, upon the certificate, notification, or signification of the chancellor of the university, or his commissary, they do supersede such inquisition or cognizance, and not put the parties to answer before them, but that the party shall be chastized and punished before the chancellor or his commissary only. 10 *Mod.* 226, 128. *Cro. Car.* 73. pl. 1. *Lit. Rep.* 40, 41. *Hardw.* 505. pl. 4.

The privilege of universities is not allowable, unless one of the parties is a scholar or servant of a college, and resident at the university at the time of the suit commenced, and it is sufficient if one party only is a member; but if either party is entered into a college by a trick to avoid a suit, his privilege shall not be allowed him. *Salk.* 343. pl. 2. *Lit. Rep.* 304. 2 *Brownl.* 74. *Barnard, K. B.* 49, 50. *Comb.* 171. *Lit. Rep.* 41. *Hell.* 26. *Sec. Hardw.* 509. 2 *Ventr.* 106. *Godb.* 404. pl. 485. 3 *Salk.* 383. pl. 7.

The privilege of the universities is not allowed against the privilege of the *common-pleas*, *king's-bench*, or *exchequer*, or in an action against a scholar and another person who is not privileged, nor where the contract is made out of the university, nor does it extend to sue there for the penalty of an act of parliament, nor to a replevin. *Lord Raym.* 342. *Hell.* 26. *Lit. Rep.* 41, 304. *Cro. Eliz.* 180. pl. 13. *Hardw.*

Hardr. 188. pl. 15, 507. *Hetl.* 28. *Brownl.* 74. 3 *Bulstr.* 272. *Skin.* 265. pl. 3. *Fitzgib.* 153. pl. 6. 299. pl. 3.

In a suit in the *Exchequer*, by the writ of *quo minus*, if the plaintiff is neither accountant or debtor to the king, nor an officer of the court, will not oust a member of the university of his privilege, if demanded before imparlance. *Hardr.* 504. 10 *Mod.* 128. 3 *Salk.* 383. pl. 8.

A *quo minus* is not a writ of privilege, nor is it so called, as when privileged persons sue in the courts where they are privileged. *Dy.* 328. pl. 9. 3 *Leon.* 323. pl. 300.

If a plaintiff were an accountant, and entered on his account, that would alter the case, because his attendance then would be requisite from *day to day*. A writ of *quo minus*, is now but a common action in the *Exchequer*; it did not lie unless a debt were confessed to the king, and then the king's debtor had a *quo minus* for the king's benefit. *Hardr.* 507.

The sheriff had process against one *A.* and he took one *A.* if he were known by one name or the other, it is good; otherwise not. *Mo.* 407. pl. 548.

If the sheriff execute a *capias*, and there is no original to warrant it; he is excusable, but he must take notice at his peril of the person and goods that he arrests, for he is not to examine whether the original be sued out or not: but if he arrests *J. S.* instead of *J. N.* he does it without warrant. *Dalt. Sheriff*, 112.

A *capias* issued against *G.* and *E. B.* affirms himself to be *G.* and is taken, yet this shall not excuse him in an action of false imprisonment; the same law of a *commission of rebellion*. *Hardr.* 323.

Note; where there are two sheriffs, the arrest or neglect of one, is the arrest or neglect of both. *Salk.* 152.

The person of the king is so sacred, that no violent hands may in any case be laid upon him. *Stamp. de prerog.* 42, 72, 73.

A queen

A queen *regent* has the same privileges as a king. A queen *consort* is free from arrest, for every married woman in his majesty's dominions except a *femme covert*, (separate trader in *London*) has that privilege; which privilege the king's wife retains even after the demise of the crown, so that a *queen dowager* is entitled thereto. 3. *Inst.* 30. pl. 19.

By an ordination of the house of lords, on 23 *Nov.* 1693, one *Wiltshire* an under sheriff, was imprisoned by the lord chamberlain for arresting Sir G. H. servant to the king, upon a *cap. utlegat.*

Per curiam; he may well arrest him, for it is at the suit of the king himself, and he is sworn to serve it. And by all the judges of *England*, he who procured the commitment of the under sheriff ought to pay all the charges and expences. And it is adjudged, the king's servant is not so privileged from arrests but that the sheriff ought to return his writ, unless he shews his privilege on the arrest. *Lit-Rep.* 65, *Co. Rep.* 40. pl. 108. *Kel. Rep.* 40. pl. 108.

The court declared their opinion to be, that none of the king's servants *in ordinary* can be arrested without notice first given to my lord chamberlain, who cannot privilege any perpetually, but in convenient time must either remove such, or make them pay their debts; but if the bailiffs without notice, do arrest any such, the messengers of my lord chamberlain cannot rescue the prisoner by letter (the arrest being lawful,) nor by warrant, but the party is punishable for his contempt, for no man knew the king's servant by his face, but he must shew his privilege on the arrest. *Keb. Rep.* 137. pl. 70 *Keb. Rep.* 842. pl. 33. *T. Raym.* 152, 34.

On motion for an information against a bailiff for carrying a person, whom he had under an arrest, to an alehouse against his will; this being an offence against an act of parliament; and this he prayed notwithstanding the process was out of the *common pleas*; he said he did allow, there was a clause in the statute which gave the party injured, a liberty to proceed in a summary method by petition to the court out of which the process issues; but he submitted it, the party had a right to wave that liberty, and to proceed in the ordinary course of justice notwithstanding. The

court said, that might be a matter to be considered of, so made a rule to shew cause. *Salk.* 45, 460. *Barnard K. B. Reports* 259.

On shewing cause, the court was of opinion, that tho' this was an offence before the act of parliament, yet the intent of the legislature was, that the offender should be punished only in a summary method, by applying to the court where the offence was committed; and therefore refused to interpose their authority by information. *Barnard K. B. Reports* 296.

Upon complaint of Mr. B. against the defendant, who was a bailiff, for refusing to carry him to the house which he appointed, and for not reading the clause in the *Statute of 2 Geo. cap. 22.* when he arrested him; the court ordered the defendant to pay Mr. B. 5l. for his damages together with his costs; and likewise committed him for the contempt. *2 Barnard K. B. Reports* 213.

A defendant petitioned against a sheriff's officer for extortion &c. praying relief according to *Stat. 2 Geo. c. 22.* and the court made a rule for the bailiffs to shew cause why an attachment should not be issued against them, and not to answer the matter complained of; the former having been the method constantly used here, and the latter against the use of the court. *Barnes Notes*, p. 26.

No bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, which shall then subscribe his name thereunto; upon pain of being punished for so doing. *Lib. Abr.* 115, 194.

Also it was held, that a warrant to confess a judgment taken of a man under an arrest, in the presence of an attorney's clerk, or solicitor, was void. *2 Strange* 902.

The sheriff is not bound to execute attachments in person but he may do it by his bailiff. *Dy.* 241. *2 Rel. rep.* 457. *Lord Raym.* 21. And that which is done by the warrant

of

of the sheriff, is done by the sheriff himself, for the act of his lord is his own act.

A bailiff of an hundred may execute a writ out of the hundred where he is bailiff, for he is bailiff all the county over. *Lib. Abr.* 266.

Sheriff's bailiffs shall not be prejudiced by the non-return of the sheriff. The defendant (as bailiff of an hundred) took goods on execution, on a *feri fac.* and sold them, and delivered the money to the sheriff; it is good, and no *trover* lies against the sheriff, for they did execute, *as the writ required.* *Leon.* 244. pl. 200.

The false return of the sheriff shall not make the bailiff punishable in an action; for he is bailiff errant, and a mere servant. *De Stud. b. 2. p. 127.* As the bailiff justifies by the sheriff's warrant, plaintiff replies, the sheriff returned upon the writ *Tarde. Cro. El.* 181.

If a bailiff errant, or special bailiff arrest a man upon a *capias ad satisfaciendum*, and after the prisoner rescue himself, he at whose suit he was arrested, may not have an *action on the case*, upon the escape against the bailiff, but he ought to have it against the sheriff; for the bailiff is but a servant to the sheriff. *Vin. Abr.* 573. pl. 3.

In an action against the sheriff for a false return of two *fi. fa.* the officers who took the goods in execution were called as witnesses for the defendant; and the council for the plaintiff objected to their being sworn, because they generally give security to the sheriff. Here the chief justice said, that did not yet appear, and ask them; upon which the officers owned they had given security, but that they had delivered the goods over to the assignees by order of the under sheriff, and they had a warrant from the under sheriff, which they called a *supersedeas* for their so doing; and upon its being produced and read, their testimony was allowed, for that it appeared to be a full indemnity to them from the sheriff for what they had done. *Gen. Syst. of Bank.* 25, 26. *Law for and against Bank.* 289.

In an action against the sheriff for a false return of *non est inventus* on *mesne* process; lord chief justice *Raymond* refused to admit the sheriff's bailiff, who had the warrant, to be a witness upon the trial to prove, on behalf of the sheriff, that he often endeavoured to have arrested the defendant on the original action on the *ca. sa.* but could not, *but not allowed*, for the bailiff was no legal witness, because he is interested in the cause, having given security for his due executing process, and by consequence could not be a witness in his own cause. *Strange* 650. 2 *Lord Raym.* 1412.

An under-sheriff brought debt against one of his bailiffs on his bond to save harmless on executing process, &c. and assigns the breach, that the bailiff had not executed such his warrant sent to him upon a process directed to him out of the *Exchequer*, to levy issues upon certain lands. Defendant demurs, 1. Because the warrant directed to him was made out of the county. 2. It is not alledged, that the manor *A.* where he was by the warrant to levy the issues; is within the hundred where the bailiff had jurisdiction: *By the court*, it is a good exception, and the breach is not shewed to be within the obligation; because a bailiff cannot execute a precept out of the hundred where he is bailiff. *Hil.* 18. *Al.* 10. For though the words of the condition were general, to make a return of all warrants directed to him; yet it was to be understood of such only as were to be executed within the hundred of which he was made bailiff. 2 *Saund.* 414.

Rule of Michaelmas Term; 1732. 6 Geo. 2. sect. 7. in C. P. Whereas many inconveniencies happen in causes depending in this court, by reason that sheriffs officers, bailiffs, and other persons concerned in the execution of process, offer themselves, and are permitted to be bail in any actions, and for great sums of money; now for prevention of the like mischief and inconvenience for the future; it is ordered by the lord chief justice, and the rest of the justices of this court, that from and after the last day of this present term, no sheriff's officer, bailiff, or other person in the execution of process, shall be permitted or suffered to become bail in any action or suit depending in this court.

Bailiffs, Gaolers, &c. their Power and Duty. 69

Pet curiam. We have seen so much oppression in letting the sheriff's officers be bail, that we think proper to concur with the *common-pleas* in a general rule, not to accept them or serjeants at mace. 2 *Strange K. B.* p. 890.

In error objected to one of the bail, that he was a palace-court officer; but over-ruled, and the bail allowed. The rule of this court to prevent sheriffs officers, and other persons concerned in the execution of process, from being bail, extends only to process of this court, whereon defendants having been bailed by the officers who arrested them, were greatly imposed on and abused. 2 *Barnes Notes*, p. 79.

A palace court officer offered to justify himself in court as one of the defendant's bail, plaintiff objected, that no sheriff's officer, bailiff, or other person concerned in the execution of process, can be bail by the general rule of *Mich. 6 Geo. 2.* Defendant answered, that by a case in error, 20 *Geo. 2.* the court had determined that the said rule related only to bailiffs executing process out of this court. The court exploded the doctrine of that case, which was determined (as thereby appears) in the absence of the lord chief justice, and rejected the bail offered. They held, that the rule extends to all bailiffs, officers, and others concerned in the execution of process. The rule was made for the benefit of the plaintiff, not merely to prevent impositions, and abuse on defendants, as in the said case mentioned. An ancient rule of this court, *Mich. 1654*, says, That no attorney shall be bail, and a modern rule, *Mich. 6 Geo. 2.* says, That no attorney of this or any other court, or any person practising as such, shall be bail; the rule is the same with respect to officers executing the process of this and all other courts. *Suppl. to Barnes Notes*, p. 9, 10.

Action on the case against a bailiff for concealing a *feri fac'*, after he had levied the Money upon it. *Rel. Rep.* 78.

The bailiff of *Westminster* had returned a bill of *Middlesex*, with a *superfedeas* out of *Chancery*, because it was with an *ac etiam*; the court conceived the return void, and gave him only *four days* to return his writ, on pain of

100l. and would not suffer him to take by a new writ
Lil. Abr. 84.

If a distress at the suit of *A.* issues out of the court of *G.* directed to *J. S.* (who is not the usual officer) to distrain the cattles of *B.* &c. or that *B.* should find pledge, to appear the next court; and thereupon *J. S.* distrains the cattle of *B.* without taking sufficient security, &c. and *B.* does not appear; an action lies against *J. S.* for the deceit, notwithstanding he is no known officer. *Lat.* 159.

An action lies not against the bailiff for refusing bail, but for not conveying the party before the sheriff in order to put in bail. *2 Mod.* 32.

If *A.* brings *B.* to a common inn, of which *C.* is host; and affirms to *C.* that he hath arrested *B.* by virtue of a commission of rebellion; and in consideration, that *C.* will keep *B.* as a prisoner, by the space of one night, assumes and promises to save *C.* harmless, &c. If *B.* recovers against *C.* in an action of false imprisonment, *C.* may have an action against *A.* upon this promise; for though the consideration, *viz.* the keeping of *B.* was unlawful, yet, because it did not appear to *C.* to be so, the promise to save him harmless was good. *Hut.* 55. *Winch.* 48.

B A I L. *The manner of taking the same and compleating it on the return of the Writ.*

When a sheriff, coroner, &c. has arrested any person by *mesne process*, he is not only authorized to take bail for the defendant's appearance at the return of the writ, but he is also obliged to do it; otherwise an action on the *case* may be brought against him.

By *Stat. 23 Hen. 6. c. 10.* Sheriffs, under sheriffs, &c. shall let out of prison all persons in their custody, by force of any writ, bill or warrant, in any personal action, or by cause of indictment of trespass, on reasonable surety of persons having sufficient within the counties to keep their days, (persons in ward by redemption, execution, *capias* *in legatum*, or excommunication, surety of the peace, and all

all persons committed by special commandment of any justices excepted.) And no sheriff, or his officers, shall take any obligation for any cause aforesaid, or by colour of his office, and on condition written that the prisoners shall appear at the day contained in the writ, bill, or warrant; and if any sheriff or officer take any obligation in other form by colour of their office, it shall be void; and he shall take no more for the making of such obligation, warrant or precept, than 4d. Offenders against this act shall forfeit treble damages to the party aggrieved, and 40 l. one moiety to the king, and the other to him that will sue.

Yet notwithstanding the sheriff, &c. is obliged to take bail, if the plaintiff does not like the securities, and does not accept on an assignment of the bail-bond, the plaintiff may call on the sheriff for a return of the writ.

By *Statute 4 & 5 Ann. cap. 16.* If any person shall be arrested by process out of the courts at *Westminster*, at the suit of a common person, and the sheriff or officer takes bail for the defendant's appearance, the sheriff, &c. at the requests and costs of the plaintiff, or his attorney, shall assign to the plaintiff the bail-bond, by indorsing the same, and attesting it under his hand and seal in the presence of two witnesses, without stamp, provided the assignment be stamped before the action brought therein. And if the security be forfeited, the plaintiff, after assignment may bring an action thereupon in his own name, and the court may, by rule, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the security, as is agreeable to justice; and such rules of court shall be in nature of a defeazance to such bail-bond.

By *Statute 4 & 5 William & Mary, cap. 4.* The judges of the *King's-bench* and of the *Common-pleas*, or any two of them respectively, whereof the chief justice to be one; and the barons of the *Exchequer*, or any two of them, whereof the chief baron to be one, may, by commissions under the seals of the respective courts, empower persons, other than attorneys and solicitors, in all the counties of *England* and *Wales*, and town of *Berwick*, to take

recognizance of bails in actions depending in the said courts, in manner as the said justices and barons have used to take the same, which recognizance shall be transmitted to some of the justices or barons; who, upon affidavit of the due taking, shall receive the same, upon payment of usual fees; which recognizance shall be of like effect, as if it were taken *de bene esse* before any of the said justices or barons; for taking of which recognizance the persons impowered shall receive 2s. And any judge of assize may take such recognizance, which shall be received without oath, upon payment of usual fees. And all who shall personate others before any commissioners, &c. empowered to take bail, shall be adjudged felons.

In all cases of removal of causes, be it by *habeas corpus* privilege, or *certiorari* out of inferior courts, special bail is required, though the sum for which the defendant was sued be under 10l; so that the plaintiff may not be in a worse condition than he was in the court below; and the reason hereof is, that those inferior jurisdictions being confined, they cannot follow the debt out of their own jurisdiction; and therefore it is requisite that they should be bail who live within their precincts.

By rule Mich. 6 Geo. 2. C. B. No attorney of the *Common-pleas*, nor any person practising as such, shall be bail in any suit depending in the said court; nor no sheriff's officer, bailiff, or other person concerned in the execution of process, shall be permitted to be bail in any action in the said court.

By rule Mich. 8 Ann. In the *King's-bench*, where the defendant is arrested in *London* or *Middlesex*, and shall give a bond for his appearance, he has leave for four days after the return of the writ to put in special bail; and where he is arrested in any other county, he has six days after the return. These days are reckoned exclusive of the appearance-day.

By rule Mich. 16 Car. 2. K. B. And every attorney who puts in special bail before a judge, *de bene esse*, or a *cepi corpus*, shall forthwith give notice thereof to the plaintiff's attorney.

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By rule Mich. 13 Geo. 2. C. B. The defendant's attorney shall give notice to the plaintiff's attorney of the taking bail before commissioners in the country, within four days after the taking thereof.

By rules Trin. 4 W. & M. K. B. & Easter 5 W. & M. C. B. If the bail be taken before a commissioner in the country, an affidavit thereof must be made either before a judge of the court to whom such bail shall be transmitted, or before some person authorized to take affidavits in that court.

By rule Trin. 4 W. & M. K. B. All bails taken before commissioners within the distance of 40 miles from London and Westminster, shall be transmitted to one of the judges, within 8 days after the taking thereof; and if above the distance of 40 miles, it shall be transmitted within fifteen days after the taking thereof, unless all the judges be in their circuits, and then as soon as any of them is returned to his chambers.

By rules Easter, 5 W. & M. Hil. 6 Geo. 1. In the Common-pleas, if taken before any commissioner within 40 miles from London and Westminster, it must be transmitted within ten days after the taking of it; and if taken above forty miles within 20 days, unless the judges be in their circuits, and then as soon as any of them return to London.

By rules 16 Car. 2. & Mich. 8 Geo. 2. K. B. If the plaintiff thinks fit to except against the bail put in before a judge, he must do it within twenty days after notice given of its being put in, else the exception is void.

By rule Trin. 4 W. & M. K. B. And if taken before a commissioner, bail may be excepted against 20 days after it is transmitted, and notice given of the taking thereof.

By rule Easter, 5 W. & M. The like in the Common-pleas.

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By rule Easter, 5 Geo. 2. K. B. In every action where special bail is put in, and excepted against, and notice of exception is given in writing to the defendant's attorney the defendant shall procure his bail to justify, if the notice be given in term time, in four days after notice, or shall add other bail; who shall justify within four days; but if such exception be taken and notice thereof given in the vacation, the bail put in, or other additional bail, shall justify upon the first day of the subsequent term.

By rule Trin. 3 & 4 Geo. 2. In C. B. if special bail be excepted against, the defendant shall perfect it within four days after exception, or the plaintiff may proceed on the bail bond.

By rule Trin. 13 Car. 2. K. B. Attornies who put in bail by recognizance before a judge if the plaintiff accepts it, to file the said bail within 20 days after such acceptance, under the penalty of 40s.

By rules Hil. 6 Geo. 1. & Mich. 6 Geo. 2. C. P. After bail is transmitted it shall be forthwith filed with the proper officer, or otherwise it shall be no bail; and the plaintiff is at liberty to proceed on the bail bond, as if no such bail was ever put in; and the defendant, in case he be admissible to plead to the original action, shall not be admitted to do, unless he first pay to the plaintiff the full costs of suit on the bail bond; and plead as of the time when bail should have been duly entred.

Bail piece must be ingrossed on a 2s. piece of parchment, paying in term 4s. in the vacation 5s.

When bail justify in court, pay judges clerk 2s. 6d. bringing up bail piece, council to move to justify, 10s. 6d. court fees on justification 9s. if at a judge's chambers by consent pay plaintiff's attorney for consent 10s. 6d. judges clerk in term 1s. in vacation 2s.

Bail being justified in court, get rule of justification from clerk of the rules, pay for same 4s. 6d. serve copy on plaintiff's attorney, take bail piece from judge's chambers, and file

file same with proper officer, pay filing 4d. when bail is complete. If bail is not excepted against in time, according to rule on affidavit of the fact, take bail piece from judge's chambers, and file it as before.

Bail cannot justify in a town cause, at a judge's chambers, without the consent of plaintiff's attorney.

Bail are not liable to a greater sum than sworn to, and indorsed on the writ and costs of suit.

Where the debt does not require bail in its original state the addition of costs will not warrant it. *Burr Rep.* vol. 3. page 1389.

No special bail is required in an action of debt on a judgment where the defendant has superseded the original action, nor where he has superseded himself for want of being charged in execution within 2 terms. *Ibid.* 1448.

Where a defendant lies in prison till the action is super-sedable, though he afterwards gives a security for the debt yet he shall not be held to bail. *Str.* vol. 2. page 1218.

If husband and wife are arrested for a debt contracted by the wife before marriage, the husband must put in bail for himself and his wife, but the wife may be discharged on common bail on summon before a judge. *Ibid.* 1272.

If on an arrest the defendant goes to gaol before the return of the writ on which he is arrested for want of bail, in order to be discharged, he must put in and perfect his bail, which when done, he may get released on summons *M. S. Cases of Pract.*

If a defendant be arrested by a wrong name on putting in bail to the sheriff he need not join in the recognizance, and then he is not barred pleading a misnomer.

By rule Easter, 5 Geo. 2. K. B. Where the plaintiff declares for, or recovers a greater sum than that which is expressed in the process, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on
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the process, or for any lesser sum, which the plaintiff shall recover.

By rule Trin. 1 Ann. K. B. If any person or persons being bail in this court for any defendant in any action whatsoever, be impleaded by action of debt upon their recognizance, such person or persons shall have leave to surrender such defendant into the custody of the marshal of this court in discharge of his bail, by the space of eight days next after the return of the *latitat*, or other process against such bail. And upon notice thereof given to the plaintiff or his attorney, all further proceedings against such bail shall stay.

And when the bail is impleaded on a *scire facias*, they may bring in the body of the defendant at any time before the return of the *alias scire facias*, and surrender him in their discharge, for till then the bail has not forfeited their recognizance.

By rule Trin. 1 Ann. K. B. Where any defendant is surrendered in discharge of his bail, the defendant's attorney must forthwith give notice of it to the plaintiff's attorney, and make affidavit thereof, before bail-piece shall be filed, or the bail discharged, and on default thereof surrender is void.

By rule Trin. 3 Ann. K. B. Where any person shall surrender himself in court, or before one of the judges in discharge of his bail, the *reddidit se* shall be left with the secondary, or clerk of the judge, before whom such person was surrendered, to be affiled; and a copy or note thereof, under the hand of such judge or secondary, shall be delivered to the marshal at the time of commitment, and such copy or note shall be made by the person so surrendered, or his attorney.

When the defendant has surrendered himself, a certificate from the prison, that the defendant is in custody, must be taken to the master of the King's-bench office, who will thereupon discharge the bail-piece; and till that is done, the bail are liable.

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By rule in the Common-pleas in *Michaelmas* 1654, the principal surrendering himself at any time after bail put in, and before or upon the day of appearance of the *scire facias*, returned *scire feci*, or of the second *scire facias* returned *nihil*; or in case there shall be an action of debt brought upon the recognizance against the bail; then if the principal shall surrender himself upon or before the process returned, no further proceedings to be against the bail.

Points determined on Arrests, Bail, &c.

Mich. Geo. 2. Faget v. Vanthiennen. Recognizance of bail was ordered to be amended, by making it in an action of trespass and assault *ad dampnum* 2000l. instead of 200l. *super assumptionem*. Two actions were depending between the parties, and bail was put in to the action *super assumptionem* before the bail now amended was put in, which was intended to be taken in the action of assault, but by mistake of the filaster was taken in the other action, contrary to the instructions given. *Vide Barne's* 4to. edit. page 59.

Hil. 6. Geo. 2. Wife against Lawrence and others. Defendants were taken on a *capias* in *Withernam* after an *elongata* returned on a *pluries*, a *capias* and *alias* to warrant the *pluries* appeared to be filed with the filaster, but not returned; for want of which a motion was made to discharge the defendants, and the court granted a rule to shew cause; but afterwards upon shewing cause, it appearing to be the constant practice to sue out the *capias*, *alias*, and *pluries*, all at the same time, the rule was discharged; and thereupon defendants moved to be bailed, and were told by the court, the plaintiff must first declare, and the defendants plead *non ceper'*; which being done, the defendants were admitted to bail. The bail being bound in the penalty of 200l. each upon their goods, &c. to be levied to the use of the plaintiff and S. his wife, upon condition that the defendants shall appear *de die in diem* in this court; and if judgment be given against the defendants, that the said defendants render their bodies in *withernam* to

to remain in custody until they render S. the wife of the plaintiff, and permit her to go at large. *Ibid.* 60.

Havard v. Nalder. Motion was made that a common appearance might be accepted in this cause for defendant, the affidavit to hold him to bail having been sworn before plaintiff's attorney as a commissioner; and a rule to shew cause was obtained, but was afterwards discharged; it having hitherto been the constant practice for the plaintiff's attorney to take the affidavit to hold to bail, practiser apprehending that no action being commenced at the time of swearing such affidavits, they are not within the same rule as affidavits sworn before the plaintiff's attorney in causes depending. It was said by the court, that this matter would be considered by all the judges at their meeting to settle the practice, upon some doubts that have arisen upon the construction of the late act of parliament. *Ibid.*

Easter, 6 Geo. 2. Atterbury v. Ward. In debt upon a recognizance of bail, a rule *nisi* for judgment for the plaintiff upon an issue of *nul tiel record* was discharged, the record of the recognizance produced by the plaintiff being conditional, and the recognizance set forth in the declaration without any condition. *Ibid.*

Steward v. Bishop. One person became bail for the defendant before a judge, and surrendered him to the *Fleet* prison. The plaintiff after the render proceeded to serve the sheriff with a rule to bring in the body. And upon a motion to stay the proceedings against the sheriff, a question arose, whether one person only being bail, the render was effectual or not; and the court held the render insufficient; and refused to stay proceedings against the sheriff, but afterwards two bail were put in and justified in court; and thereupon proceedings against the sheriff were staid on payment of costs. The plaintiff insisted that he had been delayed of a trial, and that the bill ought to be bound for the debt, and were too late to render; but the court were of a contrary opinion, plaintiff having proceeded against the sheriff as above mentioned, and not upon the bail-bond. *Ibid.*

Michaelmas, 7 Geo. 2. Hadderweek v. Catmur. The defendant was held to bail by lord chief justice's order, upon affidavits of a criminal conversation with the plaintiff's wife. The defendant afterwards applied to lord chief justice, upon affidavits of himself and the plaintiff's wife, that the plaintiff having been long beyond seas, and the wife having had advice of his death, received the defendant's addresses, and married him as her second husband. The lord chief justice ordered the defendant to apply to the court, and upon reading affidavits, and hearing counsel on both sides, the lord chief justice was of opinion, that the order for the bail ought to be discharged, nothing criminal appearing in the defendant; and in cases of this kind which differ from actions brought upon contracts, no bail is required, unless by the special order of the judge, which the defendant has a right to apply to the court to discharge, if not well founded. *Fortescue and Reeve*, justices, thought that entering into the foundation of the order was examining the merits of the cause; and therefore improper before the trial. The defendant was held to bail, and had four days time to put in the same. *Ibid.*

Heath v. Afley. The original action was brought against the defendant in *Mich.* term, and for want of bail above, the bail bond was assigned in *Feb.* following; afterwards the defendant died, and the bail moved to stay proceedings against them, the plaintiff not having obtained judgment upon the bail bond; the court on hearing counsel on both sides, ordered the proceedings to be staid upon payment of costs, being of opinion that the matter was never carried farther than the bail bond standing as a security for what should be recovered upon a trial; and if that had been the case, and the defendant had died before the trial, the suit would have been at an end; the plaintiff might have proceeded more speedily; and if any inconvenience happens to him, it is through his own laches. *Ibid.* 61.

Davenport v. Wall. The same question determined in the same manner; the *capias* in the original action was returnable on the first return of *Easter* term last. The defendant died before *Trinity* term. Per Cur. the plaintiff might

might have had judgment and la. fa. of *Easter* term last, if he had proceeded as he might have done. *Ibid.*

Wingfield v. Goodridge. Bail was taken in town before a judge, and the bail, who lived in the country about ten miles distant from *London* returned home, and being afterwards excepted against, sent an affidavit of their sufficiency; whereupon on motion to justify in court, it was objected that the bail being taken before a judge in town, they cannot justify by affidavit, but must appear personally in court. The court held the objection good, but gave the defendant a week to perfect his bail, to give them an opportunity to come to town to justify. *Ibid.*

Whalley v. Martin. Defendant superseded three years since, and arrested again for the same debt; moved to be discharged upon entering a common appearance; but it appearing that one *W.* formerly the plaintiff's attorney, had, after leaving a declaration in the office, deserted the cause and absconded, whereby the defendant obtained a *superfedeas* by surprize, without the plaintiff's knowledge, the defendant was held to bail. *Ibid.* 62.

Hil. 7. Geo. 2. Martin v. Price and others. It was moved to stay proceedings against the bail in an action of debt brought upon the recognizance, the writ not having been served four days before the return. The court made a rule to shew cause, which was afterwards made absolute.

Ormona, assignee of the sheriff, *v. Griffith.* The defendant put in the same bail before a judge in due time as were bail to the sheriff. The plaintiff excepted against the bail and for want of addition or justification took an assignment of the bail bond, and proceeded thereupon. The defendant moved the court to stay proceedings upon the bail bond alleging the plaintiff, by accepting an assignment thereof, had admitted the bail to be good; but the court upon hearing counsel on both sides, refused to stay the proceedings the plaintiff by a late rule of court made in *Michaelmas* term 6 *Geo. 2.* being at liberty to except against the bail above; although it be the same bail that was taken by the sheriff. *Ibid.* 63.

Garnet v. Heavyside. The defendant moved for ten days time to put in bail, and that upon putting in good bail, payment of costs, pleading the general issue, and taking notice of trial within term, proceedings on the bail bond might be stayed. The court made a rule to shew cause, which was afterwards made absolute upon hearing counsel on both sides. The case was that the plaintiff had sued out a *testat* attachment of privilege from *Middlesex* into *Yorkshire*, and bail was taken as in a country cause, and filed with the filaster of *Yorkshire* by mistake; and in order to give the defendant an opportunity to rectify that mistake, the rule was made. *Ibid.* 63.

Hil. 7. Geo. 2. Birch executor *v. Douglas.* The plaintiff's testator had executed a letter of licence to the defendant for five years, which were not expired at the time. The defendant was arrested and held to bail at the plaintiff's suit. It was moved that the defendant might be discharged upon entering a common appearance; but the court denied the motion, being of opinion that entering into the question about the letter of licence (which could not amount to more than a release) was entering into the merits of cause. *Ibid.*

Easter 7 Geo. 2. Low v. Ravill. The defendant was surrendered by his bail to the *King's-bench* prison instead of the *Fleet* by mistake; he was afterwards surrendered rightly and the bail moved to stay proceedings upon the bail bond: A rule was made to shew cause, which was afterwards discharged upon hearing a council on both sides, the plaintiff having been delayed of a trial. *Ibid.*

Merrit v. Montford. On a *ca. sa.* against the principal whereupon to found a proceeding against the bail, left with the sheriff *February 6*, returnable *February 9*, held to be a day too soon, and proceedings against the bail stayed. *Ibid.*

Mason v. Bruce. The defendant surrendered in discharge of his bail the last day of term (being the *quarto die post* of the return of an action of debt upon the recognizance) at Mr. justice *Denton's* chambers, after the rising of the court. The filaster made a general entry of the surrender

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upon record as done in court. The plaintiff moved that the roll might be taken off the file; and a rule to shew cause was made, which was afterwards made absolute, upon hearing counsel on both sides; the surrender not being *sedente curia* was too late. *Ibid.* 64.

Hilary 8 Geo. 2. Newman v. Butterworth. The defendant moved to stay proceedings against his bail, pending a writ of error. The plaintiff insisted that the bail ought to give judgment, and that execution only should stay. Per cur. the bail ought not to be precluded from surrendering the principal; and therefore let all proceedings be staid, pending the writ of error. *Ibid.*

Cremer v. Bulman. Bail was put in, and an exception taken thereto. The defendant within the time for perfecting the bail gave notice to add and justify in court, but instead thereof did so at a judge's chambers and was surrendered to the *Fleet*, which was held insufficient, the bail not being perfected, and the rule to shew cause why proceedings on the bail bond should not be stayed, was discharged upon hearing counsel on both sides. *Ibid.*

Harriman v. Clegg. On affidavit of justification by bail, they were severally worth the sum wherein they were bound by their recognizances, after all their *just* debts paid and satisfied, held to be insufficient, not being in common form the word *just* ought to be omitted. *Ibid.*

Young v. Wood. It was moved to strike out of the bail-piece one of the bail, another (who was ready to justify) being added in his stead. Objected that no *affidavit* was produced, that the person prayed to be struck out, was a material witness in the cause, which *affidavit* the court thought necessary; and rejected the motion, whereupon it was prayed that the bail added might be struck out, which was granted. *Ibid.*

Hil. 9 Geo. 2. Ling v. Woodyer. The court ordered the hour of the day, or true time of the defendant's surrender, to be entered by the filaster, in order that it might appear whether the surrender was made before or after the rising of the court, *Mason against Bruce, Trin. 7 & 8 Geo. 2. Ibid.*

Willoughby,

Willoughby, administrator of lady *Jenkins*, v. *Rhodes*. On a bail-bond. The proceedings were ordered to be stayed on payment of costs; it appearing that lady *Jenkins* the plaintiff in the original action died before judgment could be recovered therein. *Ibid.* 65.

Gregory v. *Gurdon*. After an exception taken against the bail put in before a judge, the defendant added bail; but did not justify in court, pursuant to the rule for perfecting bail in *four days*. The plaintiff proceeded on the bail-bond without excepting against the additional bail; and the proceedings were held regular. *Ibid.*

Birch, attorney, v. *Graves*. The defendant being arrested at the plaintiff's suit in an action for fees, &c. entered into a bail-bond with sureties, which for want of bail above was assigned, and actions brought thereon; wherein the plaintiff declared. The defendant pleaded *non est factum*; and after verdicts for the plaintiff at the assizes, it was moved for leave to file bail in the original action, on payment of costs, and consenting that the plaintiff might take judgment on the bail-bond to stand as a security for what he should recover; and produced an *affidavit* from the defendant that he never, in his own separate capacity, employed the plaintiff as his attorney; and that he had a good defence in this action. A rule was made to shew cause, which was afterwards made absolute. *Ibid.*

Mich. 11 *Geo.* 2. *Sampson* v. *Wanen*. The plaintiff having made *affidavit* of his debt in *banco regis*, caused the defendant to be arrested by *latitat* indorsed for bail. The defendant removed himself to the *Fleet* by *habeas corpus*, charged with this *latitat*, and the plaintiff declared against him there without making a second *affidavit*. The defendant moved to be discharged on entering a common appearance, insisting that in order to hold him to bail regularly, the plaintiff ought to have made *affidavit* of his debt in this court, and procured it to be indorsed on the declaration according to the rule, *Mich.* 8 *Geo.* 2. A rule was made to shew cause, which was discharged, the court being of opinion that the rule of court extends only to cases where

a declaration is the first proceeding, and not to this case. *Ibid.* 66.

Easter, 11 Geo. 2. Russel v. Gately. Mr. Justice Comyns had ordered bail for 200 l. in an action for a malicious prosecution for forgery upon the plaintiff's affidavit. The defendant moved for a common appearance; and it appearing that the plaintiff was not acquitted of the indictment upon the merits, but upon a flaw, and no precedent being produced of an order for bail in such an action as this (though for false imprisonment there was) the rule to shew cause why a common appearance was made absolute. *Ibid.*

Mich. 12 Geo. 2. Paradise, assignee, v. Holiday. On a motion to set aside proceedings on a bail-bond assigned and put in suit, *Octr.* 31. last, returnable *tres Mich.* and being a country cause, the defendant had eight days after the appearance-day exclusive to put in bail, and the bail-bond could not regularly be put in suit till *November 1.* The plaintiff's counsel insisted that the bail-bond might be assigned at any time, though it could not be put in suit, which are the words of the act of parliament and general rule of court. *Per Cur'.* There is no occasion to decide this matter at present here, the bail-bond is put in suit too early; the *capias* on the bail-bond assigned appears to be sued out *October 31.* The proceedings were set aside. *Ibid.*

Simpson v. Ashburne. Rule to shew cause why proceedings on bail-bond should not be set aside. Bail above was put in, and being excepted against last vacation, the bail justified at a judge's chamber in due time; but the plaintiff being dissatisfied therewith, notice was given to justify in court on the first day of this term; the bail was not justified till *October 28,* and in the interim the bail-bond was put in suit. The court made a question, whether in such case the defendant has the first day of the term only, or the first four days of the term to justify in court; but the practice appearing to be unsettled in that particular, the point was not determined; and the justification here not being within the first four days, the bail bond was held to be regularly put in suit, but proceedings thereon stayed on payment of costs. *Ibid.*

Henley v. Anderson. Rule for the sheriff of Middlesex to bring in the body within six days, which the sheriff did not. The plaintiff moved for attachment, and the court made rule to shew cause, the sheriff shewed for cause; that bail was put in and justified; and produced the rule of their having justified: but it appearing, that they had not justified before the plaintiff's application to the court for an attachment, the court ordered, that on payment of costs the rule should be discharged. *Ibid.* 67.

Lloyd v. Painter. Rule to shew cause why proceedings on a bail bond should not be stayed, made absolute on payment of costs, accepting declaration in the original action, pleading the general issue, and taking notice of trial within term, and the bail bond to stand for security, the plaintiff having been delayed of trial. It was objected for the defendant, that the plaintiff had delayed himself; he might have declared *de bene esse*; *per. cur.* there is no necessity for so doing. *Ibid.*

Ward an attorney v. Alderton. Bail being justified in court; the defendant's council moved, after the last sitting within term, to stay proceedings on bail bond, on payment of costs. The plaintiff's council insisted, that the action being laid in *Middlesex*, and the writ returnable the first return, the plaintiff had been delayed of trial; and the bail bond ought to stand as a security; but it appearing, that no declaration in the original action had been delivered *de bene esse*, or otherwise, the plaintiff has delayed himself, and the rule must be made absolute. *Ibid.*

Carleton v. Wilkinson. The defendant was outlawed on special original, and upon reversing the outlawry, put in bail with condition as usual, to appear to a new original, to be filed within two terms. The plaintiff proceeded to judgment, and the defendant brought a writ of error; a motion was made on behalf of the bail, to discharge their recognizance, no original having been filed within two terms; and a rule made to shew cause; which was discharged: the bail may plead as they shall be advised. *Ibid.*

Elton v. Manwaring; *Thomas v. the same*. In *Monmouthshire*. Tuesday 3d November, it was moved to justify bail for the defendant who was in custody, upon the usual *affidavit*; and upon an *affidavit* of notice of the justification served on Saturday last, the plaintiff's council objected to the shortness of the notice; and that the plaintiffs had not sufficient time to inquire after the bail. *Per cur. two days* notice of justification is the general rule in all cases, and the bail must be allowed. *Ibid.* 68.

Satchwell v. Lawes. Proceedings on bail bonds stayed for want of notice of exception against the bail, put in before a judge, given in writing to the defendant's attorney. An exception had been entered in the filaster's book, and verbal notice thereof given to the defendant, but this is not sufficient; it is necessary not only to enter an exception in the bail book, but also to give notice in writing to the defendant's attorney. *Skinner* for the plaintiff. *Ibid.*

Easter 15 Geo. 2. Rayner v. Brough. A rule to shew cause why a common appearance should not be accepted for the defendant; who had been arrested in the county palatine of *Durham*; the sum sworn due, being under 20l. made absolute. For the plaintiff it was urged, that the *Statute 11 & 12 W. 3.* requiring no sheriff to hold to bail in counties palatine, on process out of *Westminster-hall* under 20l. was virtually repealed by the statute *12 Geo. 2. cap. 29.* which requires bail in cases where affidavit shall be made that the cause of action amounts to 10l. the latter being a general law, and extending throughout *Great Britain* (*Scotland* only excepted) *Per Cur.* affirmative words without negative, are not sufficient to repeal a former law, the nature of the case, and the intent of the legislature, are to be considered. Both the statutes have the same title, *viz.* To prevent vexatious arrests, and both were made in favour of the liberty of the subject; they may stand together. In county palatine 20l. must still be sworn due, to require bail. By a rule of this court, *Michaelmas 1654.* bail is required for 20l. and for no less: and though a practice was introduced in chief justice *North's* time to hold to bail for 10l. (history of the common pleas, fol. 37.) yet the old rule remains undischarged. *Ibid.*

Hil.

Hil. 16 Geo. 2. Clarke v. Harbin. Habeas corpus, returnable *immediate*, was lodged at the palace court; and nothing further was done till 20 November last term, when the plaintiff served the defendant with a rule to put in bail. The defendant insisted that the plaintiff should have served such rule within *two terms* after the *habeas corpus* brought, and was now too late. The court held, that if the defendant had put in bail upon his *habeas corpus*, without staying to be forwarded by a rule for bail, and the plaintiff had not declared within *two terms* after bail put in, the cause would have been out of court, but the rule for bail is not limited to any particular time. Rule to shew cause why proceedings should not be stayed, was discharged. *Ibid.*

Easter, 16 Geo. 2. Scaber v. Powell. Rule to shew cause why proceedings on the bail-bond should not be stayed on payment of costs, discharged, the plaintiff having delayed of trial; and the defendant and his bail refusing to consent that the bail-bond should stand for the plaintiff's security. The defendant insisted, that the plaintiff not having declared *de bene esse*, had delayed himself; but the writ in the original action being returnable last term, that objection will not hold: declarations *de bene esse* are necessary to take the advantage of the term, if the writ be of the first or second return, where the defendant is to plead without imparlance, but not otherwise. *Ibid.* 69.

Trin. 16 & 17 Geo. 2. Lister v. Wainhouse. The plaintiff excepted against the bail, and for want of a justification in time, proceeded upon the bail-bond. A declaration was delivered in the original action, after the time for putting in bail expired, as a declaration *de bene esse*. The defendant moved to stay proceedings on the bail-bond; insisting, that this declaration must be looked upon as delivered in chief, and consequently as a waiver of the exception; and that the demand of a plea confirms it. The court over-ruled the first objection, as to the declaration, but held the demand of a plea to be a waiver of the exception; it is admitting the defendant to be in court, and in a condition to plead. Rule absolute to stay proceedings on the bail-bond. *Ibid.*

Jackson v. Knight. After final judgment, the defendant put in and justified bail, and obtained a rule to shew cause why a *superfedeas* should not issue to discharge him out of custody. The court discharged the rule. After final judgment it is too late to put in bail; the recognizance of bail plainly imports that it must be entered into before the defendant be condemned in the action. *Ibid.*

Hil. 17 Geo. 2. Francis v. Taylor. A bail-bond taken upon a *capias ad respondendum* sued out of this court, was assigned by the sheriff to the plaintiff; and bail above not being put in within the limited time, the plaintiff's attorney, for the sake of serving the bail with process within last term, put the bail-bond in suit to the court of *King's-bench*, where his writ was returnable on the *quarto die post* (the last general return in this court within last term being then expired). The court thought this proceeding unwarrantable. By an old rule, attornies of this court are ordered not to bring actions in other courts; and the act of parliament directing the assignment of bail-bonds, gives the court, after such bonds are put in suit, an equitable jurisdiction to stay proceedings, and to let a defendant in to try the merits of the original action upon reasonable terms; which jurisdiction cannot be exercised, unless the original action, and the proceedings upon the bail-bond were in the same court. The rule to set aside the proceedings upon the bail-bond was made absolute, with costs, by consent of the plaintiff and his attorney. *Ibid.*

Easter, 17 Geo. 2. Smithson, Baronet, assignee, &c. v. Thomas Smith, Gent. an attorney. William Smith, Gent. defendant in the original action was sued by the addition of *Clerk*, and entered into a bail-bond by that addition. Bail above was put in within due time for *William Smith, Gent.* who was arrested by the name and addition of *William Smith, Clerk*; and the plaintiff having excepted against the bail they justified in court; the plaintiff declared *de bene esse* in the original action, and the defendant pleaded in abatement within time. The plaintiff took the plea out of the office, stayed proceedings near twelve months; and then filed a bill as assignee of the sheriff, against *Thomas Smith, Gent. an attorney*, one of the bail in the bail-bond; insisting

insisting that the defendant in the original action was estopped from pleading in abatement; that the bail put in as above, is no bail for *William Smith, Clerk*; and that the defendant ought to be left to his plea of *compervit ad diem*. The court thought the application by motion proper; and that the original defendant was not estopped from pleading in abatement by the bail-bond, which must be *prout* the writ. That the manner be pursued of putting in bail, is the constant regular method, and the only way to save the advantage of pleading in abatement. Rule to stay proceedings, with costs. *Ibid.*

Mich. 18. Geo. 2. Denis, executor, v. Leekie. This was an action of debt brought on a judgment recovered in the palace court. The defendant moved for a common appearance; insisting, that as a bail was filed in the action wherein judgment had been obtained in the palace court, no bail ought to be required in this action. The court refused to order a common appearance, the plaintiff having no bail in this court before. *Ibid. 70.*

Hil. 18 Geo. 2. Studwell v. Bunton. The defendant being a seaman in actual service of the king, was arrested and held to bail in the palace-court; he removed the action by *habeas corpus*, and was discharged by this court on a common appearance according to *Stat. 1 Geo. 2. cap. 14.* The debt being under 20 l. the plaintiff objected, that the defendant had absented himself from the king's service *two days* after the time of leave given. But the court held, that the service continues whilst the defendant's name remains in the ship-books. *Ibid.*

Paris v. Stroud and his wife. The plaintiff made affidavit for bail, that the defendants, or one of them, are indebted for board, clothes, jewels, &c. provided for the wife; defendant the husband, and infant, moved for a common appearance. The court held that if an infant marries a woman of full age, (as in this case) he is liable to her debts; but thought the plaintiff's affidavit not sufficiently certain. The plaintiff had leave to make a new affidavit, and explain what was due before the defendant the wife was of age, and what after; and whether the debt, or any part, became due before the marriage, or after.

The

The plaintiff made a new affidavit accordingly; and the sum for which bail was to be given was moderated at a judge's chamber. *Ibid.*

Hil. 19 Geo. 2. Nutkins, executor, v. Wilkin. Judgment in action on bail-bond, signed two days after the plaintiff's death, and the suit thereby abated; the plaintiff gave the defendant time to plead, and died before that time expired. Now the bail-bond was put in suit by the executor of the late plaintiff deceased, and the defendant applied to stay proceedings. The *capias* in the original action was returnable *tres Mich.* and the plaintiff might have had judgment in his life-time, if the defendant had not made default, by not putting in bail above. Proceedings stayed in the original action, and on the bail-bond, on payment of 43 l. agreed to be the debt and costs in the original action and in this action. No costs in the first action on bail-bond, wherein there was no default by the defendant. *Ibid. 71.*

Easter, 19 Geo. 2. Lawford v. Gardiner and his wife. Both defendants arrested for a debt due from the wife *dum sola*; bail above put in for both, and both rendered to the *Fleet* in discharge of bail. Motion to discharge the wife, detained by mesne process not in execution. If the wife had been arrested before the husband, she must have been discharged on common appearance; after the husband is arrested, she cannot be taken into custody again. Case of liberty. Rule absolute to discharge the wife by a *superfedeas*, on entering common appearance. *Ibid.*

Mich. 29 Geo. 2. Filewood v. Smith. A palace-court officer offered to justify himself in court, as one of the defendant's bail: the plaintiff objected, that no sheriff's officer, bailiff, or other person concerned in the execution of process, can be bail, by the general rule of *Mich. 6 Geo. 2.* The defendant answered, that by a case, *Baskerville, Esq;* against *Chaffey* in error, *Easter 20 Geo. 2.* The court had determined that said rule related only to bailiff's executing process of *this court*. The court exploded the doctrine of that case, which was determined (as thereby appears) in the absence of the lord chief justice, and rejected the bail offered. They held that the rule extends to all bailiffs,

The Remedy against Bailiffs, &c. for Irregularity. 91
bailiffs, officers, and others concerned in the execution of process. The rule was made for the benefit of plaintiffs, not merely to prevent impositions and abuse on defendants, as in the said case mentioned. An ancient rule of this court *Mich.* 1654. says that no attorney shall be bail, and a modern rule *Mich.* 6 *Geo.* 2. says, that no attorney of this or any other court, or any person practising as such, shall be bail; the rule is the same with respect to officers executing the process of this and all other courts. *Vide Barne's* 4to edit. page 72.

The remedy the law gives a person against a bailiff for any irregularity in the execution of his office.

If a bailiff arrests one after the writ is returned, false imprisonment lies against him for so doing.

A precept to arrest from an illegal court, will not save the officer from an action of *falsa imprisonment*. *Hob.* 61.

Trespass, &c. will not lie against the sheriff for executing process, though it were erroneous. *Hob.* 48.

One asks another if his name be J. S. who said yes; on which he arrests him, by a warrant which he had to arrest J. S. yet an action of false imprisonment lies. *Mo.* 457. pl. 629.

One had a *capias ad satisfaciendum* delivered to the sheriff, who made a warrant to his bailiff to do execution; afterwards a *superfedeas* was awarded, and delivered by the sheriff to the defendant, being his bailiff, who escaped, and the defendant retook him, and detained him in execution. This second is *false imprisonment*, for though the first imprisonment was legal, he having taken him by virtue of a warrant made before, the *superfedeas* awarded and delivered he not having notice of *superfedeas* was excusable. But the detainment in prison was afterwards wrong for he being the sheriff's servant, and by intendment having time given him, sufficient to take notice from his master, ought at his peril to take notice thereof. *Cro. El.* 918. pl. 10. *Mo.* 667. pl. 921.

An

An action of *false imprisonment* will not lie against a sheriff or gaoler, for taking the body by virtue of a *capias ad satisfac.* upon an erroneous judgment, for the execution is good till avoided by writ of error. 3 *Mod.* 325.

The liberty of a man is so tender in the eye of the law, that a small thing amounts to false imprisonment. As is exemplified in a case tried at *York*.

One in execution in the county of *Lancaster*, desired to be brought to the county of *York* to speak to his friends, and being there, endeavoured to make his escape; and the defendant commanded to stay him. He was held a principal prisoner, as well as those that laid hands on him. The defendant pleaded *not guilty*. Otherwise, had it been, had he pleaded specially, *viz.* that the prisoner was brought into another county at his own desire. But the jury honestly gave but *two pence* damage. *Roberts's* case at *York* assizes.

If a man be in the hands of the under sheriff in execution for debt, and the debtee tells the sheriff that the prisoner has satisfied him; if the sheriff release not the prisoner, it is false imprisonment to detain one after the plaintiff has commanded the sheriff to deliver him. *Cro. Jac.* 379. 3 *Bulst.* 96. *Roll. Rep.* 240. pl. 10.

A. is in execution at the suit of B. afterwards B. came to the sheriff, and told him he had made and sealed a release of the debt to the plaintiff, and that therefore he should deliver him out of execution. The sheriff doth not so, but after keeps him still in prison. The plaintiff brings action of false imprisonment. It lies.

By *Stat. 1 Rich. 2. cap. 12.* One being in execution, shall not be suffered to go out of prison by mainprice, bail, or beston, without making gree to the parties, unless it be by writ, or other commandment of the king; and the detaining him after this, amounts in law to a new taking: for the restraining of his liberty, where he ought to have it, is a caption in law. Here the sheriff ought to take notice of the party plaintiff, and at whose suit he is in custody.

By

By lord *Coke*, detainer after this, by the space of one hour, is false imprisonment: (a continuance of an inclosure is a new nuisance) if he would have helped himself here, he ought to have set forth that he knew him not to be the plaintiff, who told him of the release. 3 *Bulst.* 96, 97. The case of 20 *Hen.* 7. *cap.* 19. differs from this case, because the debt of the king was satisfied. *Rel. Rep.* 240. pl. 10. *Cro. Jac.* 379.

The party who went with the sheriff to shew to him where the goods were (in execution) the judgment being set aside afterwards, was a trespasser *ab initio*; but that the sheriff was not suable nor chargeable. 2 *Sid.* 125. See 1 *Sid.* 272. *Lev.* 95. *T. Raym.* 73.

If one be arrested by process out of an inferior court, for a cause of action which does not arise within their jurisdiction, the party plaintiff may well maintain his action against him that levied the plaint, or the officer who had executed it. 2 *Jo.* 214. 2 *Show Rep.* 148. pl. 181. 204. pl. 214. *Lutw.* 1568. *Skin.* 49. *T. Raym.* 421, 467.

If a sheriff justify by force of a *capias* to him directed, he shall say, he was sheriff at the time of the arrest, as well as at the receipt of the writ. 35 *Hen.* 6. 48, 49.

In trespass, where one justifies as an officer to do execution, *De son tont demesne*, without answering to the cause, is no plea. 19 *H.* 6. 7. *a.*

In false imprisonment, the defendant may shew twenty causes, by way of justification, and it is not double. 7 *Ed.* 4. 20. *Plowd. Con.* 86. *a.*

Where the sheriff justifies by execution, he must plead that he returned the writ; otherwise of a bailiff. *Leon.* 144. pl. 20. *Cro. Eliz.* 181. pl. 16.

If a bailiff justify by force of a warrant, he is not to say *hic in cur. prolat.* for the warrant does not continue in his hands, but he returns it to the sheriff. *Rel. Rep.* 327.

Though

Though the proceedings in a court be irregular, yet if the sheriff has power to issue out a *capias*, by this warrant, the officer may justify in false imprisonment. *Mod. Rep.* 173.

If a bailiff justify by reason of a warrant, he ought to shew the place where the warrant was made. It is sufficient if it be shewed in the rejoinder. 5 *H.* 7. 4. *Long* 5. to 101, *b.*

The sheriff ought to return his writ, otherwise justification is not good; but it is so with the servant.

False imprisonment was brought against the sheriff's bailiff; he justifies by the sheriff's warrant or *latitat*, who arrested the plaintiff and required the defendant to be aiding to him; but pleads not that the writ being returned, was executed. *Per Cur.* It is good, for the defendant has no means to reinforce the sheriff to make return thereof. *Cro. Car.* 446. *pl.* 11.

In action of false imprisonment, the defendant justified by process to the bailiff out of the court of the honour of *P.* and does not shew any process was returned, which being an immediate officer must be shewed: *contra* of an under-officer. And although he need not shew forth the letters patents, yet it must be specially pleaded such a court was granted, and that *by virtue*, &c. 2 *Keb. Rep.* 293. *pl.* 77.

If the defendant in justification of an arrest, pleads that a bill of *Middlesex* was prosecuted against the plaintiff, by which the sheriff made and directed a warrant to arrest him; it shall be intended that the bill was delivered to the sheriff before the making of the warrant, till it be specially shewed to the contrary. In this case he justifies by writ to the sheriff, and warrant to himself. *Saund.* 299.

The causes of demurrer were, because it is not shewed the writ was delivered to the sheriff, nor the warrant made before the arrest; and also for that it is not averred that the writ was returned. *But not allowed*: This is no essential matter, nor traversable; and the plaintiff might have replied, that the arrest was before the delivery of the writ,
else

The Remedy against Bailiffs, &c. for Irregularity. 95

else the court will intend it to be delivered, being said that *virtute* of a writ directed to the sheriff, and warrant, the defendant arrested; and the writ need not be returned by a bailiff errant. 2 *Keb. Rep.* 607. *pl.* 41. 838. *pl.* 70. 844. *pl.* 81.

The same in *scire fac'* on recovery in action on the case; the defendant pleads, no *capias* issued out against *H.* delivered to the sheriff; plaintiff replies, a *capias* issued out, and *non est inventus* returned; but says nothing of the delivery to the sheriff. Defendant demurs, and judgment for the plaintiff, for delivery to the sheriff shall be intended. 3 *Keb. Rep.* 668. *pl.* 47.

Note, Upon demurrer to a replication to assault and battery, and *faux imprisonment*, defendants justify by a precept to arrest, &c. The principal exception to the plea was, that the justification of an arrest by *molliter manus imposuer'*, was not any justification of the battery; and the case of *Stoney v. Calvert* was cited. *Hil. 3 W. & M.* which upon a demurrer was adjudged accordingly by the whole court. 2 *Lutw.* 929.

The time when a *latitat* issued forth is traversable, and may be averred otherwise than according to the *teste*; for a relation shall not work a wrong. 2 *Keb. Rep.* 173. *pl.* 56. 198. *pl.* 25.

If a man be taken in vacation by a warrant without a writ, and a *latitat* be procured, *teste* in the term, that *teste* shall not discharge the wrong done after the *teste*, and before the actual taking out of the writ; but the plaintiff may take issue that he prosecuted truly. But in trespass and false imprisonment the defendant, as sheriff's bailiff, justified by a *latitat Teste* 27 June, *Trin. Term past.*

The plaintiff replies, that the said writ was really and actually prosecuted out of *K.B.* on the 9th of *August*, which was after the arrest of the plaintiff.

Defendant demurs. And *per Cur'*; this is an *estoppel*, especially in case of a bailiff, where warrant might be before the arrest; and all writs must be *tested* as of the term,
and

and the sheriff's not returning the writ; or the not having any, shall not prejudice his under bailiff.

Per Curiam: A good action will lie against the sheriff or bailiff of a franchise in this case. *Ibid.*

In trespass and false imprisonment against the sheriff and bailiff, the defendant justified by warrant on writ to the sheriff, as in *Long v. Bolton's* case. The plaintiff replies, no writ was then taken out. Defendant demurs, and judgment for the plaintiff; for tho' the bailiff has a warrant, yet he is liable if there is no writ. *Contra*, if the writ be void and delivered. 2 *Keb. Rep.* 705. pl. 69.

. In *trespass and false imprisonment*, the defendant justifies by arrest on *latitat*. Plaintiff replies, the writ was taken out after the arrest. Defendant demurs. *Per Cur.* the antedate of the writ will not suffice, if the proceeding be after. And judgment for the plaintiff. 3 *Keb. Rep.* 213. pl. 21.

In *Richardson v. Pricket's* case, it is to be observed. The plaintiff supposed the arrest and imprisonment to be 10th *Decem.* 29 *Eliz.* Defendant pleads, by virtue of a warrant from the sheriff he did arrest and imprison the second and third day of *December* before; *absque hoc* that he was guilty before or after, &c. plaintiff replies, he was guilty of the trespass, &c. after the third day of *December*, as is set forth in the declaration, and issue upon this, and well enough though he says, only he was guilty after the third day: but says not, and before the action brought. For when it is said, he was guilty after the third day, &c. *prout*, &c. it is to be intended to be the third day, and the day of which he counted. *Cro. Eliz.* 95. pl. 6.

To all the imprisonment, but *eleven hours*, the defendant pleads *not guilty*; and to the imprisonment for *eleven hours* he justifies as sheriff, for that the plaintiff hindered him in the execution of his office, and said nothing to the *vi & armis*, yet good. *Sand.* 78. But this case went farther, 2 *Keb.* 237. the trespass and false imprisonment was laid the first of *April*; the defendant justifies at another day at *Warw.* as sheriff, *absque hoc* that he was guilty the first of *April*, or at any other time before or after, while he was sheriff,

The Remedy against Bailiffs, &c. for Irregularity. 97

sheriff, or at any other place. *Per cur.* this traverse is sufficient, and the plaintiff must reply, and shew if there were any other assault or imprisonment. Also the traversing the time before and after, does not lock up the plaintiff from assigning another day and place, especially the thing being local. *Saund. 78. 2 Keb. Rep. 237. pl. 13.*

On a justification in false imprisonment by a writ of *supplicavit de bono gestu* out of *Chancery*, and arresting him by the sheriff's warrant thereupon. The justification being by an act in the same county, and justifying all the time in the declaration, though it do not agree with it in the day, but concludes *quæ est eadem transgressio*, is good enough, the day not being material; and the replication is not good, if it vary from the day in the declaration. *Cro. Car. 228. pl. 6.*

The case was, trespass, &c. *ultimo die Octob. 6 Car.* and detaining him in prison for two days. Defendant justifies, because 13 *Aug. 6 Car.* a writ of *supplicavit* issued, and by warrant from the sheriff to the defendant, he arrested the plaintiff 21 *Sept.* and detained him two days, &c. *quæ est eadem transgressio*, &c.

In false imprisonment in *London V. W.* defendant justifies in *Norfolk* by force of a warrant to the sheriff *quæ est eadem transgressio absque hoc* that he is guilty in *London*. Plaintiff demurs generally.

1. Because the plea is double; for the justification in *Norfolk quæ est transgressio*, had been sufficient without more and then the traverse makes it double. But *per cur.* you shall not take advantage of this upon a general demurer. *Rol. Rep. 221. pl. 26. Cro. Jac. 372. pl. 1.*

2. He justifies by warrant and says not, *hic in curia prolat*, *Per cur.* they need not shew this to be in court, for it appears to be executed, and that the warrant is returned to the sheriff. And so for this last point is *Rol. Rep. 327.*

In trespass in *London*, defendant justifies by a warrant in the county of *N. quæ est eadem transgressio*. &c. and traverseth that he is guilty in *London, vel alibi extra com N.* and good. *Cro. Jac. 372.*

If the defendant in trespass justify the same day and place, it is not necessary to say, *quæ est eadem*, &c. *Bulst.* 138. *Keb.* 27, 29.

An action of false imprisonment by a woman. The defendant says, that she was carried to *Southwark* by her consent, which is the same imprisonment; and this is no plea for imprisonment is against the will of one, and that is not so. 14 *Hen.* 6. *cap.* 2.

In assault, battery, and wounding; the defendant says, that he held his hands upon the plaintiff peaceably, and arrested the plaintiff the same day, which is the same assault battery and wounding; and held it was no plea for the reason aforesaid. 21 *H.* 7. 49.

In false imprisonment, the defendant justifies as sheriff, that he arrested the plaintiff by a *capias*; and it is good, if he say, it is the same trespass, otherwise not, 22 *E.* 4. *B.* 10. *false imprisonment*, 29.

In false imprisonment, the defendant justifies (as sheriff,) the taking the plaintiff by force of a *capias* directed to him at D. within his county of G. where the plaintiff declares of an imprisonment in another county, where the traverse of the county is good; for the defendant cannot take the plaintiff, by force of the said process, in any other county than where he is sheriff: and so the justification is local. 3 *Leon.* 97. in *Partridge* and *Poole's* case.

The defendant justifies the arrest *quamque* bond given to appear in B. R. without this that at any time he did arrest without reasonable cause until he gave such bond. Plaintiff demurs generally, *per cur.* the justification is good, and the plaintiff should have traversed, *absque hoc* that he was arrested, and detained till obligation to appear in B. R. 3 *Keb. Rep.* 165. pl. 42.

In an action of false imprisonment. Defendant justifies by arrest, by virtue of a warrant of the sheriff on a *latitat.* The plaintiff replies, *De injuria sua propria absque tali causa.* This is naught upon demurrer, being matter of record; but

The Remedy against Bailiffs, &c. for Irregularity. 99

but issue being taken upon it, and being in the affirmative, it is a *jeofail*, and good after verdict. Judgment for the plaintiff. *Keb. Rep.* 125. *pl.* 37. 164. *pl.* 115.

The defendant justified by writ sued out of *K. B.* to the sheriff of *Devon*, and warrant and arrest thereupon at *D. &c.* Replication, *De injuria, &c. absque tali causa.* The defendant demurred generally, and judgment for him; for it is ill upon a general demurrer to put the matter of record and fact, and variety of matters, in one issue, as the warrant, arrest, &c. 3 *Lev.* 65.

The defendant justifies in false imprisonment, because a writ of *Vi laica removenda* came to the sheriff to remove the force. The plea need not say, they found him *resistentem in ea parte.*

Where the sheriff justifies by execution, he must plead that he returned the writ, otherwise of a bailiff. *Leon.* 134. *pl.* 20.

In trover of 300 sheep, 1 *Dec.* 36 *Eliz.* defendant pleads that he was sheriff of *Com' Linc'*, and that *J. S.* recovered against the plaintiff 111 l. and upon that a *feri facias*, which writ was returnable *crastin' animar'* 35 *Eliz.* that this was delivered to him, 1 *Oct.* 30 *Eli.* and that he on the 20th day of *Oct.* took the said 300 sheep, and on the 22d of *Oct.* sold 104 sheep for 40 l. and that the other 196 sheep remained *pro defectu emptorum*; and at the same day of *crastin' animar'* he returned the said writ, and all this matter, the which is the same conversion, *absque hoc* that he converted them *aliter vel alio modo.* *Per Cur'*: The plea is insufficient.

1. Because by his plea he does not confess any conversion, and then the traverse is ill. He ought upon this matter to have pleaded *not guilty*, and given it in evidence.

2. Because the declaration supposes the trover and conversion to be the first of *Dec.* 36 *Eliz.* and he justifies the conversion in *Oct.* 35 *Eliz.* so he meets not with the plaintiff in time, and therefore he ought to have traversed, and the

traverse *aliter vel alio modo* shall never answer to the time, but to the manner of the conversion.

3. He makes not any justification for four of the sheep, but that he seized them; but he shews not what he did with them. *Cro. Eliz.* 433.

In an action of battery, the defendant justifies by command of the bailiffs, to prevent rescuing goods seized on execution. Replication *De injur' sua propr'*, and traverses the command of the bailiffs. Defendant demurs generally. Resolved that the traverse was ill, for he might do it of his own accord, to prevent a breach of the peace.

But it was also said, that the defendant's plea was ill, because the action being of a battery at *D.* and the justification at *S.* in the same county, and the bailiffs had authority through the whole county, and so the justification not local; and therefore he ought to have justified in the same place. And if the place had been material, he ought to have traversed all other places within the said county. Wherefore judgment was given for the plaintiff. See 3 *Lev.* 113.

Upon a justification (for an escape) by a *habeas corpus, virtute cujus*, &c. the plaintiff in his replication traversed the *virtute cujus*, and the chief justice was of opinion that the traverse was ill, being as alledged of matter in law; but the other three justices were of a contrary opinion. The plaintiff had judgment. *Lutw.* 623.

Traverse in replication, *de injurio sua propr. absque tali warranto. Et hoc pet. quod inquisatur per patriam*, exception that it ought to have been, *absque hoc* that there was such a warrant, and not as above; but the court inclined it was good notwithstanding. 2 *Lutw.* 1460, &c.

On *scire fac* upon a judgment in debt, defendant pleads 2 *feri fac* directed to the sheriff of *L.* for levying the debt, and he by force of it took divers sheep of the defendant's for the debt, and yet detains them. *Per cur.* it is a good plea, although he do not alledge that the writ is returned; and although the writ is conditional, *ita quod habeas denarios*, &c.

&c. for the plaintiff has remedy against the sheriff, and the execution is lawful, which the defendant cannot resist.

If in false imprisonment the defendant justifies by a *ca-pias* of the sheriff, and a warrant of the sheriff to himself; there *de injuria sua propria* generally is not a good plea, because a matter of record is parcel of the cause. But there he ought to say, *de injuria sua propria*, and traverse the warrant, which is matter *en fait*.

D. brought action of assault, battery, and imprisonment of his wife, against W. and W. in C. B. defendants plead a special justification, (*viz.*) that in *Nov. 2 Jac.* action of trespass was brought by A. against *Julian G.* and on a general issue found for *Julian G.* and judgment for her; and afterwards and before execution, *Julian G.* marries the plaintiff D. and afterwards writ of error was brought in B. R. and upon a *scire facias* against the said *Julian*, judgment in C. B. was reversed; and afterwards *ca. sa.* was directed to W. and W. the sheriff, to take the said *Julian G.* and they took her, with an averment, that the said *Julian G.* and the wife of the now plaintiff, was one and the same person.

Plaintiff demurs, because when the warrant is against *Julian G.* there is no such *Julian G.* for by her marriage with the plaintiff, she had another name, and his averment cannot help him, because it agrees not with his warrant. But it is otherwise, had the variance been in the name of baptism only.

But *per cur.* the *scire facias* was according to the judgment in the C. B. and well then might all the subsequent process be so; but if the husband had come upon the *scire facias* and shewed how that she was *covert*, then the action ought to be against both of them. And,

The parties themselves, in all the proceedings throughout, have all admitted that she is the same person, and had the same name, and they shall be concluded from saying the contrary, and though the sheriff had shewed the marriage, this was but a bare allegation and suggestion of the sheriff; and it appears not whether it were judicially so or not.

It would be dangerous for the sheriff to return a *non est inventus*; for because the parties have all admitted her name to be so in all proceedings, the sheriff shall be *estopped* also, 3 *H.* 7. 10. and then action on the case would lie on the false return, if the woman should be in the company of the sheriff, and she escape. *Brownl.* 226. 2 *Balsf.* 80.

In trespass for taking goods, defendant pleads a recovery in the court of *Dorchester*, in debt against the plaintiff, and execution upon this by *feri fac*; and justifies the taking, appraising and sale (by consent) of the plaintiff, in part of the satisfaction of the judgment recovered, *quæ est eadem captio*. Plaintiff demurs, because the defendant varying in the time of the taking from the time alledged in the declaration, he ought to traverse any other taking; for the same goods may be taken at several times, and the *quæ est eadem captio* is not sufficient; as 2 *Jo.* 146.

But *per cur.* the averment sufficeth, *Keil* 27. *Balsf.* 138. *Cro. Car.* 228.

Justification in trespass, assault and battery, by process out of an inferior court of record, is not good without shewing whether the court was holden by charter or prescription. 2 *Jo.* 165.

In trespass and battery the defendant justifies by process to arrest one *Wood*, and the plaintiff would have rescued him; whereupon he did plead *molliter manus imponere*.

The plaintiff replied, *De injurio sua propria absque hoc*, that the defendant had *virtute* of such a warrant taken, as that by which the defendant justified. Defendant demurs. *Per Cur'*: The justification is sufficient, and better by the admittance of the replication, than if the issue had been offered, *De injurio sua propria* generally, without such traverse. 2 *Keb. Rep.* 293. pl. 77.

In trespass and imprisonment, the defendant justifies by a *capias*, and that the plaintiff did afterwards escape; and he being bailiff, did follow him by virtue of the same warrant taken out upon the *capias*.

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The plaintiff replies, he escaped by the licence of the sheriff, and traverseth the latter taken by virtue of the warrant. *Per Cur'*: The traverse is idle, because the plaintiff had sufficiently confessed and avoided; and if he escaped by the sheriff's licence, that ought to be the thing put in issue, and not the traverse. *Brownl.* 197.

On a justification by a sheriff's warrant held the bar was ill, for that it was not shewn out of what court the *capias* issued; and for that the plaintiff had judgment. 2 *Lutw.* 1460.

In trespass against two for assault and battery, and menaces, &c. and breaking open the dwelling-house, &c. one of the defendants justifies by virtue of a writ *De homine replegiendo*, *W. L.* and a warrant delivered to the other from the sheriff for that purpose, in whose aid he entered, the door being open, and the plaintiff assaulted him, whereupon *molliter manus imposuit*, &c. the other defendant imparls.

Then the plaintiff prays *oyer* of the sheriff's warrant, which appears to be directed to all his bailiffs, and then replies, *De injuria sua propria*, and traverses, that the first defendant entered by command of the other defendant; and the defendant rejoins, that he entered, &c. by command of the other, and then tenders issue thereon. And the plaintiff demurs specially. 2 *Lutw.* 1428, 1432.

Judgment was given for the plaintiff; and it seems chiefly for the defect of not averring, that *W. L.* that was to be replevied, was in the plaintiff's house at the time of the entry made, &c. and the reporter sets forth several cases to that purpose.

And as to an exception, that the writ *De homine replegiendo* was conditional, as *Nisi captus fuit per speciale mandatum domini regis*, &c. The defendant, he says, ought also to have averred, that *W. L.* was not taken by any special mandate, &c.

And the reporter further adds, that being in some doubt as to this matter, he made what search he could, but found not in any book any justification by virtue *De homini replegiando*, or any authority concerning it.

On a justification by an attachment of goods and demurrer, See *Lutw.* 1456, &c. that if a trespass be alledged the 10th of November, and the justification is the 11th, *quæ est eadem transgressio*, that the plea is good without any traverse.

That altho' the plea was sufficient in matter of substance, yet the addition of the traverse, that they are guilty *aliter vel alio modo* (although meer surplusage) being specially shewn for causes of demurrer, had made it ill. *Mo.* 869. *Saund.* 312.

That an attachment of such a number of goods is not justifiable; and said, that one single thing alone might be attached; and by the chief justice, that there ought to be a reasonable distress to make the defendant appear.

That it did not appear that the Sheriffs, before whom the courts were held, had any authority to hold them; and for these reasons, judgment was for the plaintiff.

See the judges opinions, 2 *Vent.* 92. upon a special demurrer, that the traverse ought to have been omitted out of the defendant's plea; who justified in trespass (for impounding plaintiff's cattle, *quorsque finem fecit* of 10l.) by virtue of a *feri fac* for 10l. debt, and 40s. for costs, &c. upon the sheriff's warrant, whereby he took the plaintiff's cattle in execution, and caused them to be appraised, and kept them in custody until the plaintiff paid the execution money; and traverses that he is guilty before or after. By the chief justice and R. the justification should have been till he paid the money to the use of the plaintiff, and not to the use of the sheriff; and no authority in law to deliver goods back, upon payment of part of the money; it seems the goods ought to have been sold. *Cro. Jac.* 246. Judgment for the plaintiff.

Bail

Bail Bonds.

By Stat. 23 Hen. 6. IT IS ENACTED (in alia) That no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office and on condition written, that the said prisoners shall appear at the day contained in the said writ, bill or warrant, and in such places as the said writs, bills or warrants shall require. And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form, by colour of their offices, that it shall be void; and that he shall take no more for the making of any such obligation, warrant or precept, by them to be made, but 4 d.

Note, In taking these bonds under the statute, there are three matters to be observed, viz.

- 1st,* They are to be made to the sheriff himself.
- 2dly,* They are to be made to him by the name of his office.
- 3dly,* They are only for appearance at the day and place in the bond specified.

By Stat. 4th of Ann. IT IS ENACTED, That if any person or persons shall be arrested from and after the said first day of trinity term, by any writ, bill, or process, issuing out of any of her majesty's courts of record at Westminster at the suit of any common person, that the sheriff or other officer taketh bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff, in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail bond, or other security taken from such bail, by endorsing the same, and attesting it, under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp; provided the assignment so endorsed, be duly stamped before any action be brought thereupon; and if the said bail bond or assignment, or other security taken for bail be forfeited, the plaintiff in such action, after such assignment made,
may

may bring an action and suit thereupon in his own name, and in the court where the action is brought, may by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason, and that such rule or rules of the said court shall have the nature and effect of a discharge to such bail bond, or other security for bail.

Under the foregoing statute, if bail be not duly put in, or if excepted against, do not justify themselves in due time according to the rules for that purpose, *which see under the head of Bail.* If in *Middlesex* apply to the under sheriff at his office in *Furnival's inn.* If in *London*, apply to the secondary of one of the two compters, viz. *Woodstreet* or the *Poultry*, and in the country, to the under sheriff of the particular county where writ sued out, who will make the plaintiff's attorney an assignment of the defendant's bail bond, his fee for this business is 5s. when the plaintiff's attorney takes the bond and sheriff's assignment thereof, indorsed on the back, he gives the sheriff a receipt for the same.

Note, In other counties than *London* and *Middlesex*, the sheriff's fee for assignment of bail bond, is somewhat different.

Before the plaintiff's attorney can take out any writ on the assignment of the bail bond, the same must be stamped with a treble sixpenny stamp, just over the top of the assignment; and the proper officer in the stamp-office, which is kept in *Lincoln's-inn new square*, writes in red ink the day of the month and year the same was stamped.

The assignment of the bail bond being completed, the plaintiff's attorney takes out a bill of *Middlesex latitat*, &c. and according to the county or city where the writ is issued, or rather where the bail bond was assigned, for it is the assignment thereof that gives the plaintiff a right of action thereon, *note,* you then serve the defendants with process, and proceed as in another action.

After you have once taken an assignment of the bail bond, the sheriff is not answerable for their sufficiency nor can the plaintiff resort back to the sheriff by rule.

It here becomes necessary to shew our reader, that the law gives a plaintiff in a suit, two remedies, viz. to take an assignment of the bail bond, as before mention'd, or to proceed against the sheriff by rule.

If the plaintiff chuses to proceed by ruling the sheriff, his attorney must take out a rule with the clerk of the rules, at his office in *Symonds-inn, Chancery-lane*, he pays for the rule 4s, it is a *four day* rule, for the sheriff to return the writ, a copy must be served on the sheriff or his deputy. If the sheriff returns the writ, viz. a caption made, or neglects to make any return in either case, the plaintiff's attorney must take out a second rule with the clerk of the rules, to bring in the body, pay for same as the first, serve a copy thereof on the sheriff or his deputy as before, if the defendant does not put in and complete his bail before the expiration of the second rule on *affidavit* made by the plaintiff's attorney, of the service of the two rules; on the sheriff in manner aforesaid, the plaintiff's attorney gets a council to move the court for an attachment against the sheriff, pay council for the motion 10s. 6d. the plaintiff's attorney must draw up rule for attachment with clerk of the rules, you pay him for the same 5s. this rule must be taken to the *crown office* in king's bench walks in the temple, where the proper officer by virtue of this rule, makes out an attachment against the sheriff, you pay him for this attachment 13s. 4d. the plaintiff's attorney must carry this writ to the coroner of the county, who attaches the sheriff thereon, at the return of the attachment, the attorney must call on the coroner who will pay him the debt and costs. He charges for this business about 1l. 1s.

If a defendant through neglect has suffered the plaintiff to take an assignment of the bail bond, the only terms on which a court will relieve him are as follows.

The defendant must put in, and perfect his bail, (this must be done before he applies for relief) pay the costs incurred by the bail bond, being assigned to be taxed by the master or a prothonotary of the court, receive a declaration in the original action, plead to issue, and take short notice of trial, so that the same may be tried in term, or if the plaintiff has lost a trial, the court will require, that the bail do consent, that a judgment be entered against them, on the bail bond, for the plaintiff's security. If the plaintiff
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might have had judgment, in the original action, had the bail been compleated in due time, the court will not grant them any relief.

Note, The bail may obtain the above relief, by summons before a judge, or by motion of court. If by motion of court, notice in writing thereof, must be served on the plaintiff's attorney, and *affidavit* of service of notice must be made, and given to the council, who moves the same. It is a common motion, for which you give a council 10s. 6d.

An assignment of a bail bond is not good unless made by the sheriff or his deputy. *Strange*, vol. 1. page 60.

If there is any error in the writ, on which the sheriff takes a bail bond, the bail thereby become discharged. *Strange*, vol. 1. page 599.

In an action of debt brought on the bail bond, the defendant cannot traverse the arrest of the principal. *MSS. Reports.*

Note, The defendant has 4 days *exclusive* in the K. B. and the same *inclusive* in the C. P. after return of a writ in London or Middlesex, and 6 days in any other county, to put in bail above. If plaintiff takes an assignment of the bail bond before that time is expired, defendant may set the same aside with costs. *Strange*, vol. 1. 732.

By Stat. 23 Hen. 6. The bail bond must be taken in the sheriff's name, and as sheriff.

An action on the bail bond must be brought in the court where the original bail was given. *Vide Digest of adjudged cases in K. B.* page 188.

No bail is required on a bail bond. *Cases of pract. in K. B.* page 380.

A bail bond executed after the return of the writ for which such bond is taken is void by Stat. 23 Hen. 6.

Where the plaintiff takes an assignment of a bail bond he waves his remedy against the sheriff. *MSS. cases of pract.*

The plaintiff has his election either to take an assignment of the bail bond, or proceed against the sheriff by rules. *Ib.*

The court cannot make a rule for the relief of a sheriff, that the plaintiff shall accept an assignment of the bail bond taken by him, because the plaintiff may either accept such assignment or proceed against the sheriff by rules. The sheriff's remedy in this case is, to reimburse himself by suing the bail bond, if the bail taken by him are not sufficient, the sheriff is without aid. *Vide Digest of adjudged cases in K. B.* page 183.

By Stat. 23 Hen. 6. Plaintiff has his election to proceed against the defendant's bail on the bond, or by rules, against the sheriff. *Ibid.* 184.

It is a standing rule in the K. B. That in a *country cause*, after an *assize*, or in a *town cause*, after two terms, proceedings are never stopped on a bail bond on filing a common appearance. *Ibid.*

The action on the bail bond must be laid where the bond is assigned, or it is not good. *Ibid.* 186.

In an action brought by an executor of an assignee of a bail bond, defendant's counsel objected, that the Stat. says, the assignees shall bring the action. *Per Curiam*, This is an interest vested which will go to the executor. *Ibid.* 186.

Held in the case of a bail bond, the sufficiency of the bail is not traversable. *Ibid.* 187.

Held that in bail bonds, there are no set form of words to be used, if in substance they are to appear according to the design of the writ it is sufficient. *Ibid.*

Evening v. Spoorman, Mich. 22 Geo. 2. The defendant was arrested 26th May 1747, and gave a bail bond, but died without putting in bail above. The plaintiff lay still 12 months after the arrest, and then took an assignment; and put the bail bond in suit. The bail moved to stay proceedings, and obtained a rule to shew cause, which was now discharged, it appearing that if the defendant had put in bail in time, he lived long enough for the plaintiff to have proceeded to trial; and to have judgment and execution in his life time. *Vide Barnes*, 4to edit. 80.

Easter, 24 Geo. 2. *Hutchinson v. Hardcastle*. A writ returnable last Michaelmas term; bail was taken before a commissioner in the country; notice thereof given to the plaintiff's

plaintiff's attorney there, and the bail piece transmitted to *London* to the defendant's agent; he incautiously filed it with the filacer, (who as incautiously received it, without first being allowed by a judge;) the plaintiff lay by till 29th after last assizes, and then took an assignment of, and put the bail bond in suit. The court ordered the filacer to attend a judge for his *allocatur*, gave the plaintiff leave to except against the bail, if he thought fit, and stayed proceedings on the bail bond upon payment costs. The plaintiff's counsel urged, that he had been delayed, and lost a trial; but such delay is through his own *laches*; he might have put the bail bond in suit much earlier than he did. *Ibid.*

Easter, 29 Geo. 2. Woodnot v. Lilly. Rule made absolute on bail bond with costs. The *capias* in the original action was returnable 8 *Pur.* last. The defendant put in bail above last vacation in time; the plaintiff excepted against the bail; whereupon the defendant's attorney applied to the plaintiff's attorney to know whether he would accept of a justification at a judge's chambers or not; to which the plaintiff's attorney gave no answer; but for want of such justification, took an assignment of the bail bond, and put the same in suit. The defendant gave notice of justification in court, for the first day of this term; but the bail not then attending, the defendant obtained a few days time to perfect bail, and then justified in court, when the exception against bail, is in vacation time, or so late in term, that the defendant cannot regularly give notice, and justify within such term, he has by the course of the court, time to justify till the 4th day of the next term succeeding (*inclusive*) a justification in the *interim* before a judge, at his chambers, is not necessary, it is never of any use, unless where the plaintiff's attorney, to forward the cause, as in this case, he might consent to accept it (when offered) absolutely in the same manner as if in court. *Vide Barnes 4to Edit. page 81.*

Hilary 32 Geo. 2. Bradley v. Pinchbeck. Exception 14th *February* 1758, bail justified in court third day within the last easter term, same bail as in bail bond, the plaintiff to shew cause, why proceedings on bail bond (lately put in suit) should not be stayed with costs, bail cannot justify in vacation, unless by consent, four days to justify, in full term,

term, are allowed after exception, taken in vacation time. Rule absolute, *sans* costs. *Ibid.*

Philimore and another executor v. *Moore*. On bail bond. Rule to shew cause, why proceedings should not be set aside with costs, the defendant having surrendered himself to the *Fleet-prison*, in discharge of his bail, before the bail bond was put in suit, objected by the plaintiff, that the surrender being after an exception against the bail, was irregular and void, for want of a previous justification. The objection was over-ruled, and the rule made absolute without costs. *Ibid.*

Easter, 33 Geo. 2. How v. Bridgwater, Gent. one, &c. the defendant being sued in this court, by bill in an action of debt, on a bail bond, taken on an arrest, by virtue of a *king's bench* writ, obtained a rule to shew cause, why the proceedings here should not be stayed, insisting, that the bail bond could be regularly put in suit, only in that court, where the original action was brought, and so the court held; the plaintiff's council submitted, that the defendant being an attorney of this court, and as such entitled to privilege, could be sued in this court only; but that is not so, the defendant by entering into a bail bond, has waived his privilege, whether sued jointly or separately. *Ibid.*

Note, For further adjudications on this head, see the head, *BAIL*, in this work.

Hilary, 13 W. 3. Ingram v. Foot. *Holt*, Chief Justice. Proceedings cannot be staid on a bail bond till other bail be put in and justified, if excepted against. *Vide Mod. Rep.* vol. 12. page 611.

Hilary, 13 W. 3. The King v. Dawe, K. B. An attachment issued out of this court against the defendant, for a contempt committed by him, directed to the *sheriff* of *Cumberland*; on which the defendant being arrested, the *sheriff* of the said county took a bail bond, in which persons very sufficient were bound for his appearance at the return of the attachment, and let him go at large. The defendant refused to appear at the return of the writ, which was on *Friday after the Morrow of the Holy Trinity* last past; on which the *sheriff* was amerced, though he offered the plaintiff in the action

action to assign to him the *bail bond*, which he refused, alledging that the *sheriff* could not take a *bail bond* on an *attachment*. On which the *sheriff*, thinking he was oppressed, moved this court to compel the plaintiff to accept the *assignment* of the *bail bond*: and his counsel urged, that it was very reasonable that such a rule should be made; for the *sheriff* is compellable by the *statute* to let a man arrested on an *attachment* go at large on a *bail bond* given; and when he is at large the *sheriff* cannot seize him again after the return of the writ; and consequently it is not then in his power to bring him in again at the return of the writ: It will then be very hard, that when he has done his duty, and no more he shall be liable to *amercements*, for not doing that which the *law* says he cannot do lawfully. That no action lies against him in such case, appears from 2 *Saund.* 54. *Postree v. Hanson*, and 1 *Sid.* 23. and if no action lies, he ought not to be *amerced* for it. But not allowed.

Per curiam. This court cannot make a rule, that the plaintiff shall accept the *assignment* of the *bail bond*; for he may either accept of it, or proceed against the *sheriff* by *amercements*; and the *sheriff* may reimburse himself, by suing the *bail bond*, and if the *bail bond* is not sufficient (as here it was but for 40l.) he is without remedy. But it was clearly agreed, that he may take a *bail bond* on an *attachment*. *Stile* 212, 234. *Burton v. Low.* 2 *Vent.* 237. *Contra* 3 *Leonard*, 208. *Bland v. Riccards.*

Afterwards, on the last day of the term, the council for the *sheriff* shewing to the court, that this was a hard case, and that *Dawes* was in town, the court granted a tipstaff to bring him in during the sitting of the court, but he could not be found. And so nothing was done for the relief of the *sheriff*. *Vide Raym.* vol. 1. page 722. *Mod. Rep.* vol. 12. page 579.

Easter 13 *W.* 3. *Pickering's case*, *per curiam*, let the *bail* taken by the *sheriff* be ever so good, yet the plaintiff may refuse an *assignment* of the *bail bond*, and proceed against the *sheriff* by *amercements*; therefore it behoves him to take good *bail*: it is true, the *sheriff* shall not be brought into contempt for not bringing in the body; but the only way is,

to

to *amerce* him, and the sheriff may proceed on the *bail bond*; the plaintiff, by Stat. 23 H. 6. c. 10. has his election of *bail* or *amercement*. *Vide Mod. Rep.* vol. 12. page 447.

Michaelmas 1 Ann. Hyon v. Ballard. On a motion to stay proceedings on a *bail bond*, for want of bail above, the defendant produced a *release* under the seal of the plaintiff, and thereon the plaintiff's attorney suspecting it, consented to deliver a declaration forthwith, and that the defendant should plead the release, and so try it; which being done, the plaintiff was *non-suited* at the trial; but afterwards it being discovered to be a *notorious forgery*, a motion was made for a *new trial*, but the court said, they could make no rule in this case, the plaintiff being out of court on the *non-suit*; but since the rule to stay proceedings on the *bail bond* was not *absolute*, they said the cause was still before them: and therefore granted a rule for the defendant to *shew cause*, why proceedings should not go on. *Vide Mod. Rep.* vol. 7. p. 54.

Michaelmas 1 Ann. Fish v. Homer. per curiam. If a plaintiff accepts of an *assignment* of the *bail bond*, and the defendant puts in the same *bail* that were put into the *sheriff* at the return of the writ, the plaintiff cannot *except* against them; but it is otherwise, where he has not taken an *assignment*.

It is a standing rule of this court, that in a *country cause*, after an *assize*, or in a *town cause* after *two terms*, proceedings are never stopped on a *bail bond* on filing *common bail*. *Vide Mod. Rep.* vol. 7. page 62.

Michaelmas 1 Ann. How v. Granville, per curiam. After an *assignment* of a *bail bond*, if the defendant puts in the same *bail* that are put into the *sheriff*, the plaintiff cannot *except* against them; *otherwise*, if he has not taken an *assignment*, and on an action brought against the *bail*, they are not held to *bail*. *Vide Mod. Rep.* vol. 7. page 117.

Trinity, 2 Ann. Grovenor v. Soame. On a *bill of Middlesex*, taken out against three, with an *ac etiam* in *debt* on a *bond* by them jointly and severally entered into, the *sheriff* took one *bail bond* for the appearance of all three; and there being no appearance, the plaintiff took an *assignment* of the *bond*, and now moved to have the *sheriff* *amerced*.

First, It was agreed, that the *bail bond* was not according to the statute, being for a joint appearance of three several persons.

Holt, chief justice, said, it had been *adjudged* in the time of *Glyn*, chief justice, that if the *sheriff* takes insufficient *bail*, and has not the party at the return of the writ, an action would lie against him; but the contrary has been held since in the C. P. it was indeed always agreed, that an action would not lie for taking insufficient *bail*; but it was not settled, whether it would not lie for taking insufficient *bail*, and not having the party at the return of the writ; for though the *statute* commands him to take reasonable *bail*, yet if he has not the party, he shall be *amerced*, and the *statute* does not exempt him from that: The writ was in a *plea of trespass* only, and held good in *Hale's* time: and though the clerks said, they knew the *sheriff* *amerced* after an assignment of a *bail bond*, yet *Holt*, chief justice, said, he had known it denied; and so held by the other judges.

If a person accepts of an *assignment*, and the same persons are put in as *bail* to the action, who were bail to the *sheriff* he cannot deny them.

Holt, chief justice. If the same persons that were *bail* to the *sheriff*, become *bail* to the action, and the plaintiff excepts against them, and they do not justify on such exception, he may go on with *amercements* against the *sheriff*. *Vide Mod. Rep.* vol. 6. p. 122.

Easter, 3 *Ann.* *Shuttle v. Wood.* *Per curiam.* Anciently there could be no proceedings on a *bail bond* till the next term, and it is a great grievance to put it in suit till after a convenient time, though it has been otherwise practised in the C. P. *Vide Mod. Rep.* vol. 6. page 132.

Michaelmas 3 *Ann.* *Bernardiston v. the sheriff of Middlesex.* The plaintiff took out a writ against J. S. and delivered it to the defendant to be executed: on the arrest, the *bail bond* taken by the officer, was to appear at the suit of *Bernardiston*, and bail was put in by that name, and after a
reddidit

reddidit se, i. e. he has rendered himself, by the same name, the plaintiff sued the sheriff for an escape.

The court was moved, that the *bail piece*, and *reddidit se* might be made according to the writ.

Per curiam. It cannot be; for the *bail* must be according to the *bail bond*, and not according to the writ, or the return of it; and though it be *an error of the writer* of the *bond*, yet we cannot help it. *Vide Mod. Rep.* vol. 6. page 309.

Easter 4 Ann. Butler v. Rolls. The defendant was sued on a *bail bond*, to which action he pleaded, and had notice of trial; and then he moved to stay proceedings on the *bail bond*, on bringing the *principal*, *interests*, and *costs*, into court; which was granted, so as he brought it in by such a time, that the plaintiff might not be delayed of his *trial*, or otherwise the plaintiff might proceed.

Holt, chief justice. The *antient* practice was, that a *bail bond* could not be put in suit till a *rule* was had to *amerce* the *sheriff* for not having the body at the return of the writ; and the course now is, to stay proceedings on the *bail bond*, if there is no return of a *cepi corpus*. *Vide Salk.* vol. 3. page 56.

Hilary, 7 Ann. Sumner v. Ferryman. In debt for 60l. on a bond dated 16th of *August* 1706, on oyer of the condition, it was set forth in these words, "The condition of this obligation is such, that if N. H. do and shall appear before the *Mayor*, *Aldermen*, *Bailiffs*, and *under Steward* of the *borough* of *New Windsor*, at the next court of record, to be held at the *Guildhall* of the said *borough*, on the 19th day of *August* instant, there to answer to W. D. B. C. and B. T. in a plea of *trespass* on the *case*, then this obligation to be void, or else remain in full force, &c." The defendant pleaded in *bar*, that he was a servant to N. H. and that he was employed by H. in governing a barge laden with several peoples goods, from *Oxford* to *London*, and that in his voyage on the *River Thames* near *New Windsor* the *bailiff* of *New Windsor* pretending to have a process against N. H. and power and authority to *attach* the goods of the

said H. did *attach* the barge then being in the custody and government of the defendant, of which the said H. was master; and so hindered and detained them from going their voyage, and refused to let them go, unless the defendant would give the said bond to the said *bailiffs*; so that the said defendant, to free the barge, and that he might deliver the goods to the owners, gave the said *bond*, with the afore-said *condition*; *when indeed*, no bailiff ought to take such *bond*; and that it was took extorsively, &c. and *this he is* ready to verify, &c. to this plea the plaintiff demurs, and the defendant joined in demurrer.

Per Holt, chief justice. The defendant having submitted to the *process* let it be *right or wrong*, the *bond* which he gives, shall be a good *bail bond*, and shall not be avoided. And if the goods of a stranger are in my custody, and are *attached*, if I do not contest it, but give a bail bond, their being the goods of a stranger, shall not avoid the *bail bond*. Indeed if they had taken it *under colour of office* where there was no process at all, it had been void by the statute.

Powel, Justice, said, a man cannot avoid his *bond* by *duress* of his goods, but only to his *person*. Therefore judgment was given for the plaintiff. *Vide Mod. Rep.* vol. II. page 201.

Easter, 7 *Ann.* *Bushel v. Haynes*. In an action of debt, on a *bail bond* as *assignee* of the *sheriff* of *Sussex*, according to the late act of parliament; the plaintiff declared *generally*, without shewing the matter *specially*, that it was a *sheriff's bond*, which by the late act is *assignable*, to which there was a demurrer.

Per curiam. It should have been shewn that it was a *bond assignable*: and when the plaintiff's counsel found the opinion was against him, he prayed to *discontinue*, which was granted on payment of costs. *Vide Mod. Rep.* vol. II. page 170.

Michaelmas, 12 *Ann.* *Sestern v. Cibber*. On action of debt on a bond was brought by the plaintiff, as *assignee* of a *bail bond*, and on demurrer these *objections* were taken to the declaration.

1st, That

1st, That the breach of the *condition* was set forth to be, his not appearing *according to the requisition of the writ*, and *according to the form of the writ*, whereas it ought to have been, his not appearing at the return of the writ. 1 Lev. 145. 3 Lev. 243.

2dly, It was *objected*, that the very foundation of the action, *viz.* the breach, was set forth by way of *recital*, *when also he did not appear*, which ought to have been expressly *averred*, that so the defendant might have the liberty of traversing it.

3dly, It was not set forth on what day the writ was returnable; and then *it does not follow*, whether he did or did not appear, *according to the requisition of the writ*, consequently it does not appear whether the bond was, or was not forfeited.

Per curiam. This case differs very much from the case of a *sheriff* suing this *bond* for himself; for there he has nothing to do but to declare on the *bond*: But where the action is brought by the assignee, there it is the forfeiture that gives the action, which here is the *non appearance*, and is a matter *traversable*, and must not be set forth by way of *recital*, but must be positively *averred*.

It is true, that the declaring in an *indebitatus assumpsit*, is *when also* he was indebted: so in a bond.

But then in the first case it is the *promise*, and in the second the breach of the *condition*, which gives the action; both which are always positively *averred*, and not set forth by way of *recital*.

Parker, Chief Justice. It is not true, that there is no traversing what is only set forth by way of *recital*; for the pleas of *non assumpsit* and *non est factum*, are both of them pleas that traverse matters in these respective actions, that are pleaded by way of *recital*; besides the return of the writ not being set forth, is a fatal objection. *Vide Mod. Rep.* vol. 10. page 191.

Hilary, 1 Geo. Kitton v. Fagg. The case was, one *H. Hamlin*, high sheriff, did by a legal instrument, make *Lancaster* his under sheriff, in trust for *Altham*, who had been under sheriff the year before; neither *Altham* nor *Lancaster* took the oaths required by *Stat. 27 Eliz. c. 12.* after *Hamlin's* year was expired, and a new sheriff appointed, *Altham* makes an assignment of a *bail bond*; and the question was, whether *Altham* had such an authority, as that his assignment of the *bail bond* was a good assignment within the statute for the amendment of the law.

The plaintiff's counsel argued that this assignment was good.

The case turns on two points.

1st, Whether it is necessary that this assignment be made by the high sheriff in person?

2dly, If it be not, whether this assignment being made by *Altham* the under sheriff, *de facto*, be not a good assignment?

It was formerly a doubt, if the sheriff returned a *cepi corpus* (as he must notwithstanding by *Stat. 23 H. 6. c. 10.* he is obliged to take bail) and has not the body in court at the day of the return, whether he was not liable to an action. The law was not settled in this point till 21 and 22 *Car. 2.* See 1 *Vent. 35.* when it was resolved that he was not liable to an action.

In the statute for the amendment of the law, tho' the under sheriff is not mentioned, yet he is far from being excluded; he may possibly be included under the words *other officers.*

In all ministerial acts, whatever is done by the under sheriff, is of the same authority as if done by the sheriff himself.

Assignments of *bail bonds* to the plaintiff are no new things. It was a common practice before the statute; and
though

though in strictness of law a bond being a *chose* in an action, such assignments were not good, yet such assignments have been taken notice of in course of law, and not suffered to be evaded. *Foster v. Jackson*, 22 Car. 2.

This act is not in nature of an authority to the sheriff, but a judgment in parliament, that the sheriff shall do it, and he is liable to an action if he does not; and in *Chancery* he may be compelled to a specific performance, according to this act of parliament.

There were two reasons for making this act; the one to obviate the abusive practice of sheriffs in releasing these bonds; and thereby depriving plaintiffs of the advantage of them, for whose security alone they were taken. The second reason was, to remove the *chicane* of the law, that these bonds were not assignable, because *choses* in action.

Had the statute only made the *bail bonds* assignable, and not said by whom, the law would have said, that the sheriff was the person to assign it.

If the sheriff dies before assignment, must not the executor of the sheriff assign it?

As to the objection that may be made, that the circumstances required by the act of parliament to be observed in assigning, make it necessary for the sheriff to do it in person: It may be answered, that the reason for prescribing these circumstances was only to make the assignment more effectual, and to distinguish the assignments by virtue of this act, from those in use before, and may therefore be compared to fines. 3 Co. 88. But the legislature had no design to abridge the power of the under sheriff.

An under sheriff, by virtue of his office, is included in several acts of parliaments, though not named. *Stat. Westminster* 2. c. 11. 25 *Edw.* 3. c. 11. 25 *Edw.* 3. cap. 17. *Westminster* 2. c. 18. *Elegit*, *Fitzb.* N. B. 266. b. 4. Co. 64. *Fullwood's case*.

Execution is the end and life of the law. 5 Co. Rep. 92. This is a mechanical part of the sheriff's office. *Cro. Car.* 26.

As to the second point, it amounts to no more than this, whether all acts done by one that appears and acts as under sheriff, should be void for want of some circumstances, that none think themselves obliged to enquire into, and concern the under sheriff only.

Though there be an under sheriff legally appointed, yet the not appearing or acting makes no alteration at all in the case.

A gaoler *de facto* is bound to take care of the prisoners; and generally it is so, that acts done by those in reputed authority are good, 2 *Inst.* 381, 382. *Cro. Eliz.* 699. *Harris v. Jay.* *Moore* 112. *Cro. Eliz.* 34. ——— *v. Howel, and others.* 1 *Keb.* 357. If acts of under sheriffs *de facto* were void, in so many acts of parliament relating to the sheriffs, some care would very probably have been taken about it.

The defendant's counsel insisted, that the oath to be taken was an oath of office. That *Lancaster* was in a legal manner constituted under sheriff; but that *Altham* had no deputation at all, and was a mere intruder.

He insisted that supposing the assignment performed during the year of *Hamlin*, might have been good, yet it would not now, being performed after. *Moore* 112. *Yelv.* 44. 2 *Cro.* 73. *Moor* 757. 34 *H.* 6. 3, 6. 1 *Roll. Abr.* 894.

He took this difference, where a statute appoints things to be done by the sheriffs and prescribes no particular manner for the doing of it, and makes it necessary to be a personal act; there the under sheriff may do it; though the sheriff only is mentioned: but where the manner and circumstances, enjoined and prescribed by the act, make it a personal act, there the under sheriff cannot perform it; which difference answers all the instances drawn from acts of parliament.

Then he insisted, that the statute enjoining the assignment to be made under the hand and seal of the sheriff, made it a personal act.

Indeed in *Englefield's* case, 7 *Co. Rep.* 11. it is held, that tendering a ring is no personal act; but then it is resolved in the duke of Norfolk's case, there quoted, that the uses being revocable by writing under the proper hand and seal of the duke, it was a personal act, and not capable of being performed by any body else. This case is exactly the same with that at the bar, except the addition of the word *proper*, which according to 1 *Mod.* 40. and 1 *Vent.* 128. makes no difference at all.

If the sheriff dies before assignment, his executor cannot do it, this being a *case omitted*; and the plaintiff must sue in the sheriff's name as at common law before this act. Adjourned. *Vide Mod. Rep.* vol. 10. p. 288.

Trinity, 7 Geo. Watkins v. Parry. In an action of debt, on a bail bond, the defendant traversed the arrest of the principal; and on demurrer, judgment was given for the plaintiff; for otherwise this will be a way to avoid all bail bonds that are civilly taken, without exposing the party by an arrest. *Vide Strange*, vol. 1. p. 444.

Trinity, 7 Geo. Watkins v. Marsh. An action having been brought by the assignee of a bail bond on Stat. 4 & 5 Ann. the defendant pleaded, that the principal was not arrested by the person, at the suit of the plaintiff, by virtue of the *latitat*, as in the declaration mentioned; to which the plaintiff demurred. The defendant urged, that there is a condition precedent in the said stat. if the party be arrested: but judgment was given for the plaintiff.

Per cur'. The defendant first pleads, Stat. 23 H. 6. and says, by *protestation*, that this bond was taken of the sheriff officially, and then pleads the above plea. The words are, *if any person shall be arrested by writ, bill, or process, and the sheriff shall assign*; so that the last words say only, *where a process is taken out*; and it would be strange to say, no bail bond should be assigned, but where the party is actually arrested, though he should appear without an arrest. The same judgment was given in the case of *Haley v. Fitzgerald*, Mich. 12 Geo. *Vide Fortescue*, p. 364.

Michaelmas,

Michaelmas, 7 Geo. Mills, assignee of the sheriff, v. Bond. In an action on a *bail bond*, the condition of the said bond was, to appear on *Saturday next, after eight days of the Purification of the blessed Virgin*, and the term ended on *Friday*, which was the day before; and this appeared in the declaration brought by the *assignee of the bail bond*: The defendant pleaded *nil debet*, to the bond; to which the plaintiff demurred.

Per curiam. *Nil debet* is no plea to a bond, but a writ to appear out of term is a void writ, and so is the condition of the bond; and therefore the plaintiff has no cause of action on his own shewing. *Vide Fortescue, p. 363.*

Easter, 8 Geo. Belgardine v. Preston. In an action of debt, brought by the *assignee of a bail bond*, the writ appeared to be returnable in *eight days of Saint Hilary*, which was held the 23d of *Jan.* and the *bail bond* was said to be taken on the 17th of *Dec.* before the return of the writ; the defendant pleaded *Stat. 23 H. 6.* and that the *bail bond* was taken, to wit, at a certain place, on the 25th of *January*, after the return of the writ; *absque hoc*, that the bond was made the 17th of *December*, at *Westminster*.

On *demurrer*, Judgment was given for the plaintiff; for, *per curiam*, the plea makes the place where the bond was made material, which the court held to be naught.

And, *per curiam*, though the *bond* was made two days after the return of the writ, yet it is good; because the defendant has *four days* to put in bail, by the practice of the court, which the court will take notice of. *Vide Fortescue, p. 365.*

Trinity, 8 Geo. Hange, assignee of Caswell, and Billers v. Manning. An action being brought on an *assignment of a bail bond*, the defendant pleads, that at the time of the *assignment* they were not sheriffs, but out of their office, and two other persons were sheriffs at that time: The plaintiff demurs.

Per curiam. The plaintiff shall have judgment; the assignment is good, and the description of the party and sheriffs good likewise. *Vide Fortescue, p. 364.*

Trinity, 9 Geo. Tucker v. Goldburne. An action of debt was brought on an assignment of a *bail bond* taken by the *sheriff* who had arrested the defendant on a *capias*, &c. and on a demurrer to the declaration, it was *objected* that the plaintiff had not set forth the *capias*, or the *teste*, or return of any *capias*, as he ought to have done; and the court of *C. P.* being of that opinion, a writ of *error* was brought in this court; but the judgment of the *C. P.* was affirmed, for it is the *capias* which gives life to the *bond*. *Vide Mod. Rep.* vol. 8. p. 78.

Easter, 12 Geo. Peedle, assignee of the sheriff, v. Christmas. An action being brought on an assignment of a *bail bond*, the defendant pleaded *Stat. 23 H. 6.* and says it was a *bond* made for ease and favour, and therefore void; to which the plaintiff demurred.

Per curiam. The plea is not good; for since the statute, the plaintiff sets out the *process*, and the *bond* was to appear only at the return of the writ, and the defendant affirming that it was a *bond* for *ease* and *favour*, ought to have traversed the condition set out by the plaintiff; besides here are two affirmatives only, which cannot make an *issue*; and where a condition of a *bond* is set out to answer the plaintiff in a plea of *trespass*, and also to a bill for 200 l. and does not say, to a bill of the said plaintiff yet it is well; for it cannot be to a bill to be exhibited by any other person. *Vide Fortescue*, p. 365.

Easter, 13 Geo. Gregson v. Heather. In an action of debt on an assignment of a *bail bond*, brought in *London*; in the declaration it appeared the *bond* was made in *Surrey*, and that the assignment by the sheriff of *Surrey*, was laid in *London*; it was held well; for the action is brought on the assignment. *Vide Fortescue*, p. 366.

Trinity, 13 Geo. Robinson v. Taylor. In an action of debt, on an assignment of a *bail bond*, if there is a *profert* to the *bond*, it is enough, and there is no occasion to name witnesses. *Vide Fortescue*, p. 266.

Mich.

Mich. 1 Geo. Studley v. Sturt. The writ was returnable on *Wednesday*, and the *bail bond* was assigned on the *Monday following*; the court held the plaintiff was too soon by a day, for that *Sunday* was not to be reckoned as a day. *Vide Strange*, vol. 2. p. 1782.

Hilary, 3 Geo. 2. Nott v. Stephens. An action being brought by the executor of an assignee of a *bail bond* it was objected, that the act says the assignee shall bring an action. Judgment for the plaintiff; it is an interest vested, which will go to the executor. *Vide Fortescue*, p. 366.

Hilary, 3 Geo. 2. Jenyns v. Goostrey. In an action of debt, on an assignment of a *bail bond*, it appeared on the face of the declaration that the *ac etiam* was for 30*l.* and the *bail bond* for 40*l.* so bail was taken in a greater sum than the debt, contrary to the act. The declaration was demurred to, and the following exceptions taken; 1st, That the plaintiff has not set out that the writ was indorsed; but this exception was over-ruled: 2dly, That the *bail bond* being for more than the sum in the writ, vacates the bond.

Per curiam. If it were void, it ought to be pleaded, but this bond is not void; and the act makes it only a *misdemeanour* in the officer, and the act is only directory. The court of *Exchequer* were of the same opinion. *Vide Fortescue*, p. 366.

Hilary, 3 Geo. 2. Fromantel v. Williams. In this case, which was an action brought by the assignee of a *bail bond*, *Stat. 23 H. 6.* and *Stat. Geo. 1.* were pleaded; the inducement of the writ being set out differently from the *ac etiam*, the plaintiff had judgment. *Vide Fortescue*, p. 367.

Hilary, 3 Geo. 2. Watkins v. Harris. In an action of debt, brought by the Assignee of William Morris, bailiff of the liberty of the dean and chapter of *Westminster*, it was objected, that it was not said, that the assignment was under hand and seal. Answer, it is said in the declaration, the assignment being *sigillat et attestat.* held well, because in the very words of the statute. *Vide Fortescue*, p. 367.

Michielmas,

Michaelmas, 3 Geo. 2. Henry Miffin alias Peters, and others v. Sir William Morgan. On a writ of *error* brought on a judgment by *nil dicit* in debt on a bail bond in the penalty of 500 l. obtained by the plaintiff and others, against the defendant, as assignees of the sheriff of Gloucester.

The *error* signed was, that the plaintiff did not shew that the sheriff assigned the bond to them, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, according to the words of *Stat. 4 Ann. cap. 16.* but only alledged that the sheriff at the request and costs of the plaintiff in the suit, according to the form of the statute, in that case lately made and provided, did assign to the plaintiffs the said bond.

The counsel for the plaintiff in *error* insisted, that it was not sufficient without shewing particularly that the bond was assigned, as the act directed, by indorsement, &c.

The court unanimously over-ruled this exception, and said, that all defects which would have been aided by a verdict, are aided after judgment by *nil dicit*, by *Stat. 4 Ann. cap. 16.* for the amendment of the law; and it being expressly alledged, that the bond was assigned according to the form of the Statute, therefore the judgment was affirmed. *Vide Raym. vol. 2. p. 1534.*

Easter, 4 Geo. Mayhew v. Mayhew. *Nil debet* pleaded to an assignment of a bail bond, held not a good plea. *Vide Fortescue, p. 367.*

Hilary, 5 Geo. 2. Vaus v. Hall. In an action on the case, on an assignment of a bail bond, it was set out in the declaration, that the bond was assigned to the use of the plaintiff, whereas the act is, *shall be assigned to the plaintiff.*

Per curiam. It is all one, and we hold it well. *Vide Fortescue, p. 369.*

Trinity, 5 Geo. 2. Cook v. Brockhurst. In an action against the sheriff of Middlesex, for an escape, the defendant pleaded *not guilty*; and nothing appeared against the sheriff.
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Per curiam. It is well; and as to his not appearing at the day, no action will lie against the sheriff, but he must be amerced: In the case of a *bail bond* the sufficiency of the bail is not traversable. *Vide Fortescue*, p. 369.

Hilary, 8 Geo. 2. *Derby v. Rose.* A *bail bond* was given to the gaoler of the *Marshalsea* prison, after oyer of the bond and condition, he pleaded *Stat. 23 H. 6.* and that A. B. sued out of the palace of the king at *Westminster*, held in *Southwark*. It was objected to the plea, that it is not said that the process issued out of any court, but only sued out of the *palace*, instead of the *court* of the palace.

Per curiam. It is wrong. The plaintiff accordingly had judgment on the *bond*, though a *marshalsea court bond*. *Vide Fortescue*, p. 370.

Easter, 8 Geo. 2. *Derby v. Hammond.* In an action on a *bail bond* given to the gaoler of the *marshalsea* prison; it was objected, that it does not appear in the plea or declaration, that the *bond* was entered into to the plaintiff by the name of his office, but only to *John Derby*; so void by *Stat. 23 H. 6.*

Per curiam. No oyer is craved of the *bond*, so the *original bond* may be right, &c. it does not appear to be wrong.

It was then objected, that *these bonds* were not within the statute; but this objection was over-ruled; and the plaintiff had judgment. *Vide Fortescue*, p. 371.

Michaelmas, 9 Geo. 2. *Neat*, assignee of the sheriff of *Middlesex*, v. *Mills.* In the declaration, the *assignment* of the *bail bond* was set out to be attested in the presence of one witness, naming him *viz. John Weaver*, on *nil debet* pleaded, and demurrer it was held wrong. According to the statute it should be done in the presence of the witnesses. On which the plaintiff discontinued. *Vide Fortescue*, p. 371.

Trinity, 14 Geo. 2. *Shuttleworth v. Pilkington.* A *special original* being taken out returnable *before the lord the king*, *wheresoever he should then be in England*, the *bail bond* was
without

without the words wheresoever, &c. and in an action on it it was *objected*, that by Stat. 23 H. 6. (which was pleaded) the sheriff could take no *bond* but such as was to appear in the place in the writ mentioned; *whereas* this might be to compel an appearance out of *England*, if the king should happen so to be.

Per curiam. There is no set form of words for these *bonds* but if in substance they are to *appear* according to the design of the writ, it is sufficient. 2 Cro. 286. 2 Vent. 237. 2 Shaw 51. 2 Lev. 180. *Trist*. 3 Geo. 2. *Phillips v. Philips* in the *Exchequer* on a writ of *quo minus*. The plaintiff must have judgment. *Vide Strange*, vol. 2. p. 1155.

Michaelmas, 20 Geo. 2. *Merryman v. Carpenter*. The writ was returnable in *Easter Term*, and a *bail bond* taken thereon, the plaintiff never stirred till the 24th *October*, and then took an assignment, and *special bail* being put in the next day, the question was, whether on staying proceedings the *bail bond* was to stand as a security. The defendant's council *insisted* it should not, because the plaintiff did not deliver a declaration *de bene esse*, as he might have done, and thereby quicken the defendant.

Per curiam. He was not bound so to do; and the defendant was in the *first* fault, whereby the plaintiff had lost a *trial*. So the defendant was forced to consent to let the *bail bond* stand as a security. *Vide Strange*, vol. 2. p. 1262.

Trinity, 31 Geo. 2. *Chesterton v. Middlehurst*. On a *bail bond* given in the court of the county *Palatine of Chester*, in an action commenced there, which was afterwards *assigned* by the *sheriff* to the plaintiff who brought an action thereon in this court, the defendant put in *special bail* below to the action, and then moved the court to stay proceedings here.

Per curiam. The bringing an action here is *unfair practice*, unless under *special circumstances* to warrant such procedure; as for example, the defendant's living out of the jurisdiction, &c. but that not being pretended, they held that the plaintiff ought to have proceeded *below* and therefore set the proceedings aside in this court. *Vide Burrough's* vol. 1. p. 642.

Trinity,

Trinity, 6 Geo. Walton assignee, &c. v. Bent. Per curiam.
It is the settled practice, that an action on a bail bond must be brought in the same court, where the bail were taken; and in this cause the proceedings in this court were stayed the bail bond on which this action was brought being on a process out of the C. P. *Ibid.* vol. 3. p. 223.

INSTRUCTIONS *for bringing and conducting the Writ of Habeas Corpus, for removing a person to the King's-bench prison, &c.*

By Rule, Mich. 1654, K. B. ALL writs of *habeas corpus* directed to any sheriff or officer of an inferior court, for removing the body of any prisoner in *London* and *Middlesex*, the *Marshalsea*, or any other court within five miles of *London*, may be made returnable immediately. These writs may be taken out in *term* or *vacation*; and it is the duty of the sheriff or other officer to make his return, and bring up the body, as soon as possible after the receipt of the writ so directed to him.

By the same Rule. ALL writs of *habeas corpus* directed to any sheriff or officer of an inferior court, at above the distance of five miles from *London*, must be made returnable at a day certain in court. If made returnable in *Hilary* or *Trinity term*, they must not be made returnable after the second return of those terms. In order if bail is required thereon, the plaintiff in the suit may be enabled to declare of the same term, and the defendant shall be obliged to plead to issue as of these terms, so that the plaintiff may try his cause the next *assizes* if he thinks fit; or, in default of pleading, judgment may be entered against the defendant of the same term, if rules to plead are given in due time.

By the same Rule. If a writ of *habeas corpus* be sued out in *Hilary* or *Trinity term*, or the beginning of the *vacations* of those terms, the writ of *habeas corpus* must be made returnable the first or second return of the subsequent terms; viz. *Easter* or *Michaelmas*, or the plaintiff on summons before a judge may have a writ of *prosedendo*.

Note,

Note, The writ of *habeas corpus ad respondendum*, or *ad satisfaciendum*, granted to the warden of the Fleet, sheriff of a county, or keeper of any inferior prison, returnable at a day certain in court, are as good cause of detainer to such officer as a *capias ad respondendum* directed to the sheriff.

On these writs, the attorney applying for the same must, on the defendant's being brought into court to be charged with his client's debt, take especial care to have the term and number-roll indorsed on such writ of *habeas corpus*.

If the defendant is arrested, and in custody of the sheriff, to avoid going to the county gaol, he may remove himself by *habeas* to the King's-bench; but if the defendant is not in custody by process out of the K. B. and would chuse to be removed to the K. B. he must get some creditor to sue out a bailable action against him, and the writ, when completed, must be left with the sheriff before the writ of *habeas corpus* brought, or the defendant cannot be turned over.

The same practice *mutatis mutandis*, if the defendant is in custody in the K. B. and would chuse to be turned over to the Fleet, a writ of *capias* must be sued out in the Common-pleas, in same manner as in the K. B. to ground the writ of *habeas corpus*.

If the defendant is a prisoner in an inferior court the writ of *habeas corpus*, when brought, will not discharge him out of such custody till bail above is put in to the writ of *habeas corpus*, and the same justified, to avoid which inconvenience, it is most prudent to put in bail below, in order to give the defendant his liberty, and then bring the writ of *habeas corpus*.

Note, This writ is often brought when a person is not in custody, in a friendly manner, in order to secure him from being arrested by others.

By Stat. 12 Geo. 1. A writ of *habeas corpus* cannot be brought to remove an action in an inferior court, unless for a debt of above 5 l. If the defendant is charged with

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several

several actions in an inferior court, some under 5 l. and some above that sum, the writ of *habeas corpus* will remove those above 5 l. and those under that sum are not affected thereby; and the plaintiffs in such actions may proceed to judgment and execution as if no such step had been taken.

The form of a writ of Habeas Corpus to remove a prisoner from the Fleet to the K. B.

Geo. the 3d, &c. To the Warden of our prison of the Fleet,
Greeting: WE command you that you have the body of J. K. (the person to be removed) who is said to be detained in our prison, under your custody, by whatsoever name he is called in the same, together with the day and cause of the taking and detaining the said (J. K.) before the right honourable William lord Mansfield, our Chief Justice, assigned to hold pleas in our court before us, at his chambers in Serjeant's-inn, Chancery-lane, London, immediately after the receipt of this our writ, to do and receive what our said Chief Justice shall then and there consider of him in this behalf, and have you then there this writ. Witness, William lord Mansfield, at Westminster (the teste of the writ, which is the first day of term, if taken out in term, and the last day of term if taken out in vacation) in the 16th year of our reign, &c.

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The form of a writ of Habeas Corpus brought to charge a person in execution.

— Say, To satisfy A. B. for 50 l. for his damages which by hath sustained, as well by occasion of a certain trespass lately committed by the said C. D. to the said A. B. as for his costs and charges, &c. (as in the writ of Ca. Sa. on which the defendant was taken) as appears to us of record. So that, &c.

The form of a writ of Habeas Corpus to a sheriff in the country where the defendant is in custody for want of bail.

Geo. the 3d, &c. To the sheriff of (the county) of (where the defendant is in custody) Greeting: WE command you that
you

Bringing & conducting the writ of Habeas Corpus. 131

you have the body of A. B. (taken by you, and in your prison detained under your custody, as by your return lately sent into our court before us you have charged yourself) before us at Westminster (on some return-day in term, that you would have the defendant brought up) to answer to C. D. of a plea of trespass on the case (according to the nature of the action). And also (here insert *ac etiam*, as in the writ taken out against the defendant). And have, &c.

If the sheriff or other officer returns these writs, *Languidus in prisona*, i. e. Sick in prison; then you must make out the following *habeas corpus* directed to the sheriff, &c.

The form of a writ of Habeas Corpus, where a person is sick in prison, as returned by the sheriff, &c.

Geo. the 3d, &c. To the sheriff (where the defendant is in custody) Greeting: WE command you that you have the body of T. K. taken by you and detained in our prison under your custody (although sick) as by your return sent into our court before us manifestly appears to us (or if in a former sheriff's time the *Languidus persona* was made then say) as manifestly appears to us by the return of J. T. late sheriff of the county aforesaid, you have before us at Westminster (the return of the *habeas corpus*) to answer to L. M. (as before). And have, &c.

The first of these four writs is a *habeas corpus cum causa*; and if the party wants to remove the body and cause from an inferior court, it must be directed to such inferior court with the proper stile and title thereof.

The *habeas corpus* returnable immediately, is usually made returnable before the Chief Justice of the court, but bail may be taken before any Judge of the same court.

These writs are ingrossed on a 5s. stamped piece of parchment, and on another piece of parchment unstamped, make a *fiat* for the Judge thus:

JUDGE'S *Fiat*.

Middlesex to wit (*or any other county*) LET there be a
habeas corpus for A. B. to do and receive, returnable
 immediately (*or as the case may be*)

The Precipe for the Habeas Corpus.

Middlesex to wit, *Habeas corpus* for A. B. to do and
 receive,

T. K.

Returnable immediately.

November 1776.

Instructions for completing this writ.

Carry *fiat* and *precipe* to the signer of writs in K. B. who
 will sign the writ and keep the *fiat* for the Judge to sign ;
 pay signing in term 6s. 8d. in vacation 7s. 8d. sealing at
 the seal-office 7d.

The bail cannot be put in to the writ of *habeas corpus*
 till the same is returned, and if the same is to remove a
 cause from an inferior court, the bail and proceedings above
 are *de novo*.

Note, The bail to the writ of *habeas corpus* are liable to
 all actions brought from the inferior court by the return of
 the writ, if the plaintiffs in such actions declare thereon
 in two terms.

The plaintiff in the action removed by the *habeas corpus*
 must declare against the defendant in the court to which
 the cause was removed before the end of the *second term*,
 after the return of the writ of *habeas corpus*, or the defendant
 is not bound to plead to such declaration if delivered after-
 wards. If the defendant removes the cause, and puts in
 bail to the writ, he cannot *non pros* the plaintiff for want
 of a declaration.

*The steps that must be taken by the plaintiff's attor-
 ney to compel the defendant to put in and justify
 bail on bringing the writ of Habeas Corpus.*

On the cause being removed by writ of *habeas corpus*,
 as aforesaid, the plaintiff's attorney, in order to hasten the
 defendant

Bringing & conducting the writ of Habeas Corpus. 133

defendant to put in and perfect his bail, may take out a rule before any judge of the court whereto the cause is removed for a *writ of procedendo*, unless good bail be put in within 4 days next after the service of a copy of the rule, pay judge's clerk for the rule 2s. and serve a copy of the same on the defendant's attorney. If bail is not put in within the time of the rule, on *affidavit* of service of the same on defendant's attorney, and application to a judge for that purpose, he will order a *writ of procedendo* to issue.

If the defendant puts in bail on being served with this rule, he must give the plaintiff's attorney notice thereof, as in a common case, only calling them bail on the *writ of habeas corpus* brought in this cause.

Note, *If this rule is taken out in vacation, it must be a 6 day rule for bail.*

On the bail being put in to this writ, the plaintiff may except against the bail, and give notice of exception, as in a commonailable action, and the defendant must justify the same in 4 days, on giving the plaintiff's attorney notice thereof. The common practice is for the plaintiff's attorney to get a 4 day rule from the judge, for better bail, on the return of the former rule, and serve a copy thereof on the defendant's attorney; pay for 2d rule as before. If this rule is given in vacation, the defendant may justify his bail before a judge at his house or chambers, in order to comply with the same. If the plaintiff's attorney does not approve of such bail, so justified as aforesaid, he may on the *first day* of the ensuing term take out another rule for the bail to justify; in which case the defendant may add and justify other bail in court, on giving notice to the plaintiff's attorney of such his intention, as in a commonailable action.

If the defendant's attorney neglects to comply with the foregoing rules, the plaintiff's attorney may carry the cause or causes back to the inferior court by *writ of procedendo*.

The form of a writ of Procedendo.

Geo. the 3d &c. To the Mayor, Aldermen and Sheriffs of the city of London, greeting, **ALTHOUGH** we lately by our writ

writ commanded you, that you should have the body of J. K. detained in our prison, under your custody, as it was said under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said J. K. might be called in the same, before our right trusty and well-beloved William lord Mansfield, our chief justice, assigned to hold pleas in our court before us at his chambers, situate in Serjeant's-inn in Chancery-lane, London, immediately after the receipt of that writ (if habeas corpus was returnable immediately, if not the return of habeas corpus) to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet we being now moved with certain causes in our court, before us, command you and every of you, that in all complaints or suits against the said J. K. at the suit of A. B. in our court before you, or any of you, levied or affirmed, or before you or any of you, now depending undetermined, you proceed with what speed you can in such manner, according to the law and custom of England, as you shall see proper, our said writ to you thereupon first directed to the contrary in any thing notwithstanding. WITNESS William lord Mansfield, at Westminster.

Note, This writ must be ingrossed on a 2s. stamped piece of parchment, it is not signed, pay sealing 7d. carry this writ when completed to the secondary of the court where directed, who files the same, and on the authority thereof they prosecute the suit or suits so returned to judgment and execution.

General observations on the writ of Habeas Corpus, and the proceedings thereon.

On a *habeas corpus* for removing a cause from the *Marshalsea* or other inferior court, if the bail below become bail above, the plaintiff cannot except against them. It is otherwise when the cause comes out of the city courts. 1 *Salk.* 97.

By Rule Hil. 2 Jac. 2. Special bail is required in all causes removed by *habeas corpus* out of an inferior court unless the defendant be an executor or administrator or the action be for words or small trespasses if not directed otherwise by the court or judge,

On

Bringing & conducting the writ of Habeas Corpus. 135

On the removal of a cause from an inferior court an heir shall not be held to bail, *Lev.* 204.

In *Middlesex* the fees returning the writ of *habeas corpus* are as follow,

	£	s	d
If in one action - - - - -	0	9	4
If more than one action, the sheriff takes for each action - - - - -	0	2	4
If the defendant is in <i>Newgate</i> you pay for the gaoler's warrant to deliver the defendant to the bailiff - - - - -	0	2	4

If the writ of *habeas corpus* is returned in court the charge is as under

	£	s	d
Judge's clerk, for commitment of the prisoner	0	4	0
The master - - - - -	0	2	0
The chaplain of King's-bench prison - - -	0	2	0
The clerk of the papers - - - - -	0	1	0
The crier of the court - - - - -	0	0	6

Note, You pay allowing the writ of *habeas corpus* at the palace court, 5s.

The writ of *habeas corpus* may be brought to remove a person out of a private custody and the court when the party is brought before them, will use their discretion, as to their further directions thereon, *Vide Bur.* vol. 3. p. 1436.

Held that if the chief justice of the K. B. commits a person to the custody of the marshal by his warrant, he ought not to be brought to the bar of the court by rule, but by *habeas corpus*. *Vide Digest of adjudged cases in K. B.* page 504.

A person committed to the marshal by the court, may be brought up by rule of court, but if he is committed by a judge at his chambers, he cannot be brought up but with a *habeas corpus* to which a return may be made, *ibid.* 505.

If a writ of *habeas corpus* is made returnable on a day certain, the sheriff or gaoler cannot bring him up on any other day, and for his neglect he must be at the expence of a new writ. If the writ of *habeas corpus* is made returnable immediately, it is otherwise. *Ibid.*

A writ of *habeas corpus* may be obtained to enable a person in custody, to attend a trial of a cause in which he is plaintiff or defendant. *Ibid.* 507.

Held that if a writ of *habeas corpus* is brought, the officer must obey the writ, though the party refuses to pay his fees, because he has another remedy for them. *Ibid.* 509.

Held that a person might be brought into court on a writ of *habeas corpus* issued in vacation, and that to require a new writ, would be attended with delay and expence, in which case, the defendant must be committed by the judge to the custody of the marshal and afterwards must be brought up by rule of court. *Ibid.* 510.

Held that a writ of *habeas corpus ad testificandum* may be brought to bring up a prisoner in execution to be a witness.

Instructions how to commit a person on the return of the writ of Habeas Corpus.

When the writ of *habeas corpus* is returned, the bailiff must bring the defendant to a judge's chambers who will commit the prisoner, to the gaol you intend, by your *habeas corpus*, to turn him over to.

The fees paid on this occasion.

	£	s	d
The bailiff for bringing up the prisoner - -	0	10	0
The judge's clerk for the commitment - -	0	8	6
The tipstaff for carrying over the prisoner -	0	10	6

By Rule, 5 *W. & Mary.* All persons committed to the custody of the Marshal of the *K. B.* by writ of *habeas corpus*, must remain in actual custody two days next after such commitment,

mitment, though an *habeas corpus* brought from another court to remove him from thence.

By Rule, Trin. 3 Ann. All persons brought by *habeas corpus* into court, or before a Judge, in order to be committed to the custody of the Marshal of the K. B. The *habeas corpus*, with the return thereof, must be left with the Judge's clerk in order to be filed; a note, with the Judge's return of the writ, must be drawn out on a piece of parchment by the attorney prosecuting the writ of *habeas corpus*, which must be delivered to the Marshal on the commitment of the prisoner.

The form of the Commitment-piece.

Middlesex to wit (or any other county) J. K. (as described in the proceedings) is committed in execution to the Marshal, &c. at the suit of A. B. for (the debt and damages) there to remain until, &c.

F. P. }
Attorney. } Judgment, Hilary Term, 16th Geo. 3.

ROLL.

The manner of obtaining the Rules of the King's-bench or Common-pleas.

It is usual when a person intends to go over to the K. B. or C. P. and would wish to obtain the Rules of either of those prisons for to apply to the Marshal or Warden, or their Deputies, previous to their bringing their writ of *habeas corpus*, so that when they are carried over, they have nothing to do but to make their appearance in the prison, have their names entered in the prison book, and then are at liberty to retire to their house or lodging taken in the Rules for that purpose.

It behoves the person taking the Rules to do it for a sufficient sum, so that it may cover what he goes over for, or what he may afterwards be charged with in custody, or the Marshal and Warden will call the party into close custody, and he will be obliged to give fresh securities, and pay fresh fees.

The

The party taking the Rules must get two sufficient housekeepers to enter into a bond to the Marshal or Warden, to indemnify him against any debts he may be charged with by reason of the prisoners being seen out of the Rules by their respective plaintiffs.

The Marshal and Warden usually charge for the Rules 5l. *per cent.* for the first hundred pounds the prisoner is charged with, and $2\frac{1}{2}$ *per cent.* afterwards, and 10s. 6d. for entering the prisoner's name as a Ruler, together with the bond, &c.

If the prisoner's debts are under a 100l. in proportion after the above rate.

Note, In these charges, as the Marshal and Warden are restrained by no law but their own will, it behoves the party applying to them for this indulgence, to make the best terms he can.

Of being discharged out of Prison.

By Stat. 2 Geo. 2. c. 22. If any prisoner charged in execution for any sum not exceeding 100l. in any prison, shall be minded to deliver up to his creditors all his effects, it shall be lawful for such prisoner to exhibit a petition to any of the courts of law from whence the process issued, certifying the cause of his imprisonment, and an account of his estate, with the dates of the securites wherein any part of it consists, and the deeds or notes relating thereto, and the names of the witnesses; and upon such petition, the court, by order or rule, is to cause the prisoner to be brought up, and the creditors at whose suit he stands charged to be summoned; and upon the day of such appearance, if any of the creditors neglect to appear, upon an affidavit of the service of such rule, the court shall in a summary way examine the matter of the petition, and shall tender to the prisoner an oath to the effect following, (*viz.*) "I A. B. do solemnly swear, in the presence of Almighty God, that the account by me delivered into this honourable court, in my petition to this court, doth contain a true and full account of all my real and personal estate, debts, credits and effects, whatsoever, which I, or any in trust for me, have, or at the time of my petition had, or am, or was, in any respect intitled to, in possession, remainder or reversion (except the wearing apparel and bedding for me and my family,

mily, or the tools or instruments of my trade or calling, not exceeding ten pounds in value in the whole;) and that I have not, at any time since my imprisonment, or before, directly or indirectly, sold, leased, assigned, or otherwise disposed of, or made over in trust for myself, or otherwise other than as mentioned in such account, any part of my lands, estate, goods, stock, money, debts, or other real, or personal estate, whereby to have or expect any benefit or profit to myself, or to defraud any of my creditors to whom I am indebted. So help me God." If the prisoner take the oath, and the creditors be satisfied with the truth thereof, the court may order the effects contained in such account, or so much as may be sufficient to satisfy the debts, and the fees due to the keeper of the prison, to be by a short indorsement on the back of the petition signed by the prisoner, assigned to the creditors, or one or more of them in trust for the rest; and by such assignment the estate and property of the lands, goods, debts and effects so assigned, shall be vested, and the prisoner shall be discharged out of custody by order of court, without fee; and the persons to whom the effects shall be assigned, paying the fees to the gaoler, shall divide the effects in proportion to their debts; but if the persons at whose suit the prisoner was charged in execution, shall desire time to inform themselves, the court shall remand the prisoner, and direct him and the persons dissatisfied to appear at another day, within the first week of the term next following; and if at such second day the creditor makes default, or if he be unable to discover any effects of the prisoner omitted in his petition, or to shew any probability of his having been forsworn, the court shall cause the prisoner to be discharged, unless such creditor insist on his being detained, and agree by writing to pay the prisoner 2s. 4d. *per* week, to be paid the first day of every week, so long as he shall continue in prison at his suit; and on failure of payment, the prisoner shall on application to the court be discharged by order; and in case the prisoner refuse to take the oath, or shall be detected of falsity therein, he shall be remanded. The person of the debtor so discharged shall never after be arrested for the same debt; but the judgment shall remain in force, and execution may be taken out in all his lands and goods; his wearing apparel, bedding for himself and family, and necessary tools for his trade excepted. If any person

person who shall take such oath, shall upon indictment for perjury be convicted by confession or verdict, he shall suffer all the pains of wilful perjury; and shall be liable to be taken on any process *de novo*, and shall never after have the benefit of this act. If the effects assigned shall not extend to satisfy the whole debts due to the persons at whose suit he was charged; and the fees, there shall be an abatement in proportion, and the gaoler shall come in as a creditor for his fees. Every sheriff, bailiff, or other officer, offending against this act (over and above such punishments as he shall be liable to by the laws now in force) shall forfeit to the party grieved 50 l. to be recovered with treble costs.

By Stat. 8 Geo. 2. c. 24. Before any prisoner (except such who are in prisons in *London, Westminster, and Southwark*) shall petition any of the courts in *Westminster-hall* from whence the process issued, he shall send notice to the creditors, that he intends to petition the court; and also a copy of the account of his estate which he intends to deliver into court; the said notice to be left with the creditors, or some of them, or the attorney or agent employed in such cause. Upon such petition, the court is required to make a rule, to cause the prisoner to be brought at an expence not exceeding 12d. a mile (to be paid out of the effects of the prisoner; and if the prisoner have not sufficient effects, then to be paid by the treasurer of the county) to the next assizes, if within *England*; and if within *Wales* or *Chester*, then the prisoner shall be brought to the next great sessions for the county; and the creditors at whose suit such prisoner shall stand charged, shall be summoned to appear by rule of the court from whence such process issued, to be served thirty days before such assizes or great sessions. The judges of assize, or great sessions, are to appoint a time for hearing the petition, during the assizes or great sessions; and on appearance of the creditors, or in default thereof, on affidavit of their being served, the judges shall in a summary way examine such petition, upon which examination the judges shall tender to such prisoner the oath in the act 2 Geo. 2. cap. 22. and the judges of assize or great sessions shall give such relief and directions, as the court out of which the process issued, might have done; and a record of
of

of such judgment shall be made up, and returned under the hand of such judge, before whom it shall be made, to the court from whence such process issued. The judges of the great sessions in *Wales* and *Chester* shall have the same power for relief of debtors who shall be imprisoned within their precincts, as the courts in *Westminster-hall*. If any person shall be arrested by virtue of any process, or warrant and shall refuse to be carried to some safe dwelling-house of his own appointment, so as such dwelling-house be in a city or market town, then within three miles from the place where the arrest shall be made, and so as such be not the house of the person arrested, provided it be within the same county and liberty, it shall be lawful for the officer to carry the person so refusing to gaol, by virtue of such process. *Stat. 3 Geo. 2. c. 27.* no person charged in execution shall be allowed to petition upon the said acts of parliament, unless such petition be exhibited before the end of the term, next after such person shall be charged in execution. The said acts shall not relate to any person who shall be taken by *capias* for running goods, or for receiving such goods, knowing them to be run; but it shall be lawful for any officer to secure such person, as if the said acts had never been made. Where by the said acts an oath is required, the solemn affirmation of a quaker shall be taken in lieu thereof; and every person convicted of wilful and false affirming, shall suffer the penalties of wilful and corrupt perjury.

By rule Trin. 2 Geo. 1. In the King's-bench, if any defendant be committed into the custody of the Marshal, or shall be charged in his custody, or shall be arrested, or committed by process of that court, into the custody of any sheriff, or other officer, at the suit of any plaintiff, and shall remain in custody two terms, and the plaintiff does not declare against him within that time; such defendant after the end of the second term, after such imprisonment (inclusive of the term in which the writ is returnable) shall be discharged out of prison, upon filing common bail, signed by one of the judges of the court, without giving notice to the plaintiff or his attorney. And if the plaintiff declares against such defendant, and does not proceed to trial or judgment within three terms after such declaration is delivered; or if the plaintiff

plaintiff shall obtain judgment against such defendant, and does not charge him in execution within two terms after such judgment obtained, such defendant shall have leave to file common bail, or have a *superfedeas* to be granted by one of the judges of the said court, if cause be not shewn to the contrary by the plaintiff or his attorney, on notice given to either of them by the defendant, and both thereof to be made, if the plaintiff does not appear to shew cause as aforesaid.

By rule Michaelmas 1654, & Hilary 14 & 15 Car. 2. And in the Common-pleas, if the defendant be committed to prison by process of that court, or *habeas corpus*, the prisoner entering his appearance with the prothonotary in case of a plaint or an attachment of privilege; or with the filaster in case of other process, and giving rule to declare, the plaintiff not declaring before the end of the next term after the commitment, the defendant may be discharged by *superfedeas* at the end of the next term, and the plaintiff has liberty to declare upon that appearance the next term after that, at the farthest.

By rule Easter 8 Geo. 1. C.P. If any defendant shall render himself, or be rendered to the *Fleet* prison in discharge of his bill, at the suit of any plaintiff, where no further proceedings by declaration has been had against such defendant before such render, unless the plaintiff shall declare against such defendant within two terms after such render; and where any declaration have been delivered against such person so rendering himself, or being rendered, or judgment has been had against him before such render, unless the plaintiff shall proceed to judgment upon such declaration delivered within three terms after such render (the defendant having appeared) and charge such defendant in execution within two terms after such judgment obtained, such defendant may be discharged out of custody by *superfedeas* to be allowed by one of the judges of the court, if cause be not shewn to the contrary by the plaintiff or his attorney, upon notice given to either of them by the defendant's attorney or agent, and oath made of such notice.

If any plaintiff shall declare against any defendant in the custody of the warden of the *Fleet* prison, or any
2
sheriff

sheriff or other officer, and shall not proceed to judgment within three terms after declaration delivered, inclusive of the term in which the declaration shall be delivered, the defendant having appeared, or if any plaintiff having obtained judgment in any action against any defendant being a prisoner, as aforesaid, and shall not charge such defendant in execution upon the judgment so obtained within two terms next after such judgment, including the term in which judgment shall be signed, then such defendant may be discharged out of custody by *superfedeas*, to be allowed by one of the judges of the court, if cause shall not be shewn by the plaintiff or his attorney, why such plaintiff had not proceeded to judgment and execution as aforesaid upon notice to either of them given by the defendant's attorney or agent, and oath made of such notice given.

By rule Hil. 8 Geo. 2. C. P. In all cases where a prisoner in the *Fleet*, or other gaol or prison, is discharged, or ordered to be discharged by the *Common-pleas* court, or any judge thereof, by *superfedeas*, for want of prosecution, and such prisoner be afterwards arrested, or detained in custody by action of debt, brought upon a judgment obtained in the cause wherein such prisoner was so discharged; a common appearance shall be accepted for the defendant in such action.

By rule Mich. 15 Car. 2. K. B. If a defendant be legally delivered from an arrest upon any process, he shall not be arrested again at the same time; by virtue of another process at the suit of the same plaintiff. The attorney or plaintiff offending, the attorney to be expelled, and both to be punished as the court shall think fit.

*Fees allowed to the Sberiff and his Officers
under the Statutes, &c.*

At common law no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the king. 2 *Bac. Abr.* 463. *Lil. Abr.* 808. 10 *Mod.* 139.

And

This fundamental maxim of the common law is confirmed by *Stat. 3 Edw. c. 26.* whereby, "no sheriff shall take any reward to do his office, but shall be paid of that which he takes of the king; and that he who doth so shall yield thrice as much, and shall be punished at the king's pleasure."

And so much has this law been thought to conduce to the honour of the king and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been held void. *2 Bac. Abr. 463.*

The common law giving no fees to sheriffs, made them backward in executing writs, by reason of the great danger both in desperate men, by reason of resistance; and also in detaining them, for fear of escapes, so that they would have great rewards, or otherwise would do nothing: whereupon the parliament thought fit to stint their fees, as in *9 Eliz. c. 4. per Doderidge, J. Latch. 18. Cro. Eliz. 654. pl. 15.*

A promoter of the king brought an action upon the above statute of *Eliz.* against J. B. under sheriff, for taking twenty pence over his fee, *contra formam statuti*, of a prisoner in his ward, &c. the defendant said that he did not take it *contra formam statuti*, &c. and gave in evidence that he and all under sheriffs there, time out of mind, have used to take of every prisoner for suspicion of felony and acquitted, which were in their ward, twenty pence for a bar fee, &c. and the plaintiff demurred upon the evidence, &c. and by the opinion of all the justices, this is out of the case of the statute, for the intent of the statute is, where he so takes of them that be in ward, to ease them, but here, when he is acquitted, he is no prisoner: for if he escapes, the sheriff shall not be charged of the escape, and this fee was assigned by the court for a bar fee, by their discretion, in consideration of the great charge which the sheriff has in keeping, bringing, and carrying back the prisoners, and in keeping a number of servants to carry them, and in attendance for fear of escapes. And so the clear opinion of the justices was, that the twenty pence for a bar fee is out of the case of this statute. *Bro. Abr. tit. fees, pl. 6. 21 H. 7. 16.*

And

And if a sheriff takes of a prisoner his clothes, or money out of his purse in spite of his teeth, it is out of the case of this statute, because trespass lies. *Bro. ibid. and tit. prescription* pl. 36. 21 H. 7. 15. S. C.

By Stat. 29 Eliz. c. 4. sect. 1. "It shall not be lawful for any sheriff, under sheriff, bailiff of liberties, their officers, servants, or deputies, by colour of their offices, to take for the serving of any extent or execution, upon the body, lands, or goods, of any persons, more than in this act is appointed, viz. twelve pence for every 20s. where the sum exceedeth not 100l. and 6d. for every twenty shillings above 100l. that he shall levy and deliver in execution, or take the body in execution for, upon pain that every sheriff, &c. which shall do to the contrary, shall forfeit to the party grieved his treble damage, and shall forfeit 40l. the one moiety thereof to the queen, and the other moiety to the party that will sue for the same."

This statute does only extend to their executing of writs of execution in counties, and *not in cities*; and there they are allowed twelve pence in the pound, for the first 100l. and sixpence in every hundred afterwards. But then they ought to pay their own bailiffs out of their poundage money for their pains. But of late, the sheriffs of cities do demand the same as sheriffs of counties have, and I have heard they have recovered it. *Lil. Abr.* 598.

"This act not to extend to any fees to be taken for any execution within any city or town corporate." 29 El. c. 4. sect. 2.

It was resolved that this proviso extends to a city corporate, when judgment is there given within their franchise, and execution upon that, and not when judgment and execution issues out of superior courts, *Cro. Car.* 287. *Latch.* 17, 52. *Poph.* 173. For in the first case, the officer is not at that great care and peril; but as to the sheriff of a county his travel and labour is all one, be it in the body of a county or in a franchise: But if that town be a county of itself, there the sheriffs shall have their fees according to this statute.

tute. And now judgment was given for the plaintiff. *Noy* 76.

Because he is at less trouble, the jurisdiction is narrow, and the sheriff not so much in danger of an escape; but where in the principal case the jurisdiction being the palace court of the bishop of *Rochester*, and as large as the diocese, and so was insisted not to be within the like reason. But *non allocatur*. 5 *Mod.* 97.

In an information on this statute against the sheriff of *Gloucester*, for taking above twelve pence in the pound, for executing process on a judgment in *C. P.* the defendants pleaded the proviso in the statute, wherein all cities and corporations and their officers are excepted, upon which it was demurred; for *Owen* serjeant moved, that this proviso extended only for serving executions upon judgments in their courts, but not upon executions of judgments in other courts; and so it may be collected by the preamble and body of the act. But all the other *contra*, for it shall be expounded as well for serving executions upon judgments in other courts. *Cro. Eliz.* 263, 264.

And whereas it was objected, that the county of the city of *Gloucester* extends four or five miles further than the city, and that this execution was not in the city, but within the county of the city, and so is not within the proviso; the court said, that if it had been so pleaded, peradventure it should be otherwise; but as it is pleaded, it appears not to the court: and thereupon it was adjudged for the defendants. *Cro. Eliz.* 264. *Latch* 19, 52. *S. P.* per 3 *J. S. C. Palm.* 399.

The sheriff, by the equity of *Stat. 23 H. 6. c. 10.* shall take four pence for every warrant. *Winch.* 21.

There was much doubt upon the words of the statute, and the court divided upon the point, whether the sheriff should not have twelve pence in the pound for every pound to 100l. and after that sixpence? or whether he should have but sixpence for every pound when the execution is more than 100l? *Noy* 75, 76.

By

By 3 *Just.* against *Crew*, chief justice, the sheriff shall have one shilling in the pound for the first 100l. *Popb.* 173. S. C. 176. cites a case where two justices *contra* one, held, that where the sum exceeds 100l. he should have but *sixpence* for levying of every twenty shillings of the first 100l. but that judgment was given upon other points (but adds) that all the court seemed to be of opinion, that he shall have twelve pence for every twenty shillings of the first 100l. and sixpence for every twenty shillings of the residue. Held accordingly upon the first argument on a deniurrer. *Sed quære quia adjornatur.* *Cro. Eliz.* 335. By *Hobart* and *Winch. J.* the sheriff shall have sixpence only, if the sum exceeds 100l. *Winch.* 51. *Latch.* 52. accordingly adjudged and affirmed in error. *Cro. Car.* 286.

The author of the *compleat sheriff*, p. 479. makes the following *quære*, viz. when one sheriff shall make the *extent* and the other sheriff the *libertate*, who shall have the fees given by the statute?

In answer to which *quære*, I shall set forth an act of parliament, to which the above author has often referred his reader in the said *compleat sheriff*.

By *Stat. 3. Geo. 1. c. 15. sect. 9.* "When any sheriff shall, by process out of the *exchequer*, extend any goods, &c. into the hands of his majesty &c. for any debts due to the crown, and shall die or be superseded before a *venditioni exponas* be awarded for sale, or before he has made actual sale thereof, and a writ shall afterwards to a subsequent sheriff, who shall make sale of such goods, &c. the barons of the *exchequer*, if sitting, or if not sitting, they, or any of them, of the degree of the Coif, shall settle the fees of the poundage for such seizure and sale, between such preceding and subsequent sheriff, with regard to the trouble each sheriff had in the execution of such process."

Note; The fees shall be paid by him that sets him to work and not by the prisoner; of whom the bailiff on arrest having taken seven shillings for attorney's fees, was convicted of extortion. *Keb. Rep.* 623. pl.

Poundage was allowed the sheriff out of 100l. (fine imposed after conviction on indictment of battery in *K. B.*) levied upon a *feri fac*, and it was allowed out of the money in the hands of the clerk of the crown, paid by the sheriff; though there was no precedent in *K. B.* for it. But the barons always make such allowance in the *exchequer*, after the monies paid in there by the clerk of the crown. *Skin.* 12. pl. 13. 2 *Jo.* 185.

By *Stat. 3 Geo. c. 15. sect. 13.* "No sheriff, under sheriff, bailiff, or other person employed in levying any debts, &c. due to the crown by process of the *exchequer*, shall take any fee on pretence of such levying, &c. except four pence for acquittance, which such officer is to give to the person on whom such debt, &c. is levied; and the bailiff, &c. receiving such debt, &c. shall account for the same to the sheriff, and may require an acquittance from such sheriff without fee; from which debts the sheriffs shall discharge the debtors by totting and answering the same on their accounts in the *exchequer*; and if any sheriff, &c. shall *nichil* or not duly answer to the crown any debt so levied, he shall forfeit treble damages to the party grieved, and double the sum, which shall be decreed to the party grieved by the court of *exchequer*, on complaint and proof of such abuse before the barons, in such summary way as to them shall seem meet. And if any sheriff, &c. shall demand any sum for forbearing to levy any such debts written out to them by the said process, every such offender shall be adjudged guilty of extortion, injustice and oppression; and being thereof convicted shall forfeit treble damages and costs to the party grieved, and double the sum extorted, to be decreed by the barons, on complaint and proof, in a summary way; provided such conviction be within two years after the offence."

By *Seet. 14.* "Nothing in this act shall deprive any sheriff of any such poundage or allowance as is hereby given, or of such poundage or reward as may be given them by warrant from the *Treasury*, chancellor of the *Exchequer*, or the barons for any extraordinary service to the crown."

By *Stat. 3 Geo. c. 15. sect. 3.* "All sheriffs who shall levy any debts, &c. except post fines due to his majesty, by

by process upon summons of the pipe, or green wax, by *levari facias* out of the *exchequer*, shall have an allowance on their accounts of twelve pence out of every twenty shillings, for any sum not exceeding one hundred pounds, and six pence for every twenty shillings above the first hundred pounds, and for all debts, &c. except post fines due to his majesty by process, and *feri facias*, and extent, issuing out of the *exchequer*, one shilling and sixpence out of every twenty shillings over and above the first hundred pounds; provided such sheriff shall answer the same on his account, by the general sealing day of such term, in which he ought to be dismissed the court, or in such time to which he shall have a day granted to finish his accounts, by the chief baron, or one of the barons of the coif, and not otherwise."

One *B.* was outlawed at the suit of one *L.* in a plea of debt in the *common pleas*, from whence a special *capias ut legatum* issued, and several lands of the defendant in the county of *Devon* were seized.

The outlawry being transcribed into the *exchequer*, a writ of *levari* issued to the sheriff, by virtue of which he levied the rents and profits to the value of 60 l.

The defendant obtained an order for six weeks time to plead, and to have restitution of the money upon giving security, which order was served upon the sheriff and which he was willing to comply with, deducting his poundage, according to the above statute.

Now upon a motion for an attachment against the sheriff for not obeying the order, the question was, whether he should not retain his poundage, or should be left to have it allowed in his accounts with the crown?

And the court seemed clearly of opinion, he should detain his poundage, and pay the residue only to the defendant, but would not absolutely determine it in this method. *Bunb. Rep.* 305. pl. 388.

By *Glynn*, Chief Justice. There are no fees due to the sheriff for executing an *habere facias possessionem*; and so let
L 3 it

it be declared, although they have usually taken fees for executing such writs. *Lil. Abr.* 808.

It was resolved, that the *Stat. 29 Eliz. c. 4.* does not extend to real executions, but only to executions in personal actions; therefore it does not extend to a writ of *habere facias seisinam* or *possessionem*. *Salk.* 331.

The sheriffs took 300 l. to execute a writ of *hab. fac. possessionem*. *Het.* 52. *Lit. Rep.* 65. 2 *Brownl.* 283.

Per Curiam. It is great oppression to the subjects, that the sheriffs (to whom the statute had given so much in the pound, in case of execution against a personal estate) should take such fees in case of a real estate; and it was said, it was not to be found that they have any legal fee upon this execution: But the usual fee, which they ought to take, is 2s. 4d. 2 *Sid.* 155.

By *Stat. 3 Geo. c. 15. sect. 16.* 8 *Geo. c. 25. sect. 5.* "It shall not be lawful for any sheriffs, or their bailiffs, or for the bailiff of any liberty, by colour of their office, or by reason of their executing any writ of *habere facias possessionem* or *seisinam*, to receive any greater fee than 20 s. of the yearly value of any lands, &c. whereof possession or *seisin* shall be given, where the whole exceeds not the yearly value of one hundred pounds."

Stat. 29 Eliz. c. 4. Does not extend to executions upon statutes-merchant recognizances, &c. for the act is to be understood of cases where the judgment *Redditur in invitum*, and not by the voluntary confession of the party. *Salk.* 332.

In an action against a sheriff for his fees, it was objected, that this was a *ca' sa'*, the which was not a satisfaction, and the statute does not give any fee to the sheriff, but only permit him to take a fee not exceeding such a rate. But *per cur'*: the usage has always been since the statute of 28 *Eliz.* to take a fee upon a *ca' sa'*, and such a fee is allowed to the sheriff for his trouble which he had in the execution; and therefore, if there be a second execution, he ought to have a fee for that also for his trouble as well as for the first. *Skin.* 363.

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Upon a *capias ad satisfac'*, the sheriff shall have his fees for the whole debt. *Salk.* 331.

Powell, junior Justice, said, It was the opinion of *Holt*, Chief Justice; that the sheriff should have fees for *executing an elegit*; but he said he doubted of that, because it would be unreasonable when the debt is 300 l. and perhaps the land extended but to 20 l. *per annum*, that the sheriff should have fees for 500 l. *Treby*, Chief Justice, said, that he should have fees *according to the sum levied*, and not according to the debt recovered, as upon a *feri facias*. To which *Powell* answered, that that could not be, because the party might detain the land till he was satisfied the entire debt; and the plaintiff is, by having made his election, barred of all other executions. *Salk.* 332.

By Stat. 3 Geo. c. 15. sect. 17. "Poundage in no case shall be taken on executing any writ of *capias ad satisfaciendum*, or on charging any person in execution by virtue of such writ, for any greater sum than the real debt amounts to; which sum the plaintiff is to mark on the back of the writ before it be delivered to the sheriff: and if any sheriff, &c. shall take greater fees, such offender shall be adjudged guilty of extortion, injustice, and oppression; and being convicted shall forfeit to the party grieved treble damages, and double the sum extorted; to be decreed by the court out of which such writ issued, on complaint and proof of such extortion before the court, in such summary way as to them shall seem meet. And every person so offending shall forfeit 200 l. one moiety to the king, and the other to such as shall sue in any court at *Westminster*, provided such suit be commenced within two years after the offence."

It was held by the court, that the statute extends to all judgments in *Westminster*, and that whether the sheriff executes them in a county or in a franchise, he shall have his fees within this statute, *viz.* one shilling in the pound for the first 100 l. and six pence a pound for every other 100 l. and so it is of the bailiff of a liberty, when he executes any execution on a judgment given at the courts at *Westminster* within his liberty; but if the bailiff or other officer executes

process on a judgment given in a court of corporation or liberty, he is not entitled to fees within this statute. *Salk.* 331.

Upon a *habeas corpus*, the officer ought to bring the prisoner to the court, and his refusal to bring him, unless paid his fees beforehand, is a contempt; for the king's writ must be obeyed, and the court will tax the charges and compel payment, if the officer and prisoner cannot agree, or payment is not made according to the agreement. 2 *Jo.* 178. *March 89. Keb. Rep.* 280. But see *Keb. Rep.* 566. *contra.*

On a motion against *Bambridge*, the warden of the *Fleet* it was held that if an *habeas corpus* is brought, he must obey it, though the party refuses to pay his fees, for he has a remedy for them, 2 *Strange* 814. *Keb. Rep.* 272. pl. 57.

The sheriff had the defendant in execution on a *capias ad satisfaciendum*, and the plaintiff delivered him an *habeas corpus*, in order to remove him into the king's bench prison: the sheriff upon this insisted to be paid his poundage on the execution, before he parted with the body of the defendant, and would have distinguished this from the cases in 331, 332, 333. Inasmuch as he had actually here executed the process and those cases go only against his insisting to be paid beforehand. And that there is nothing in the statutes 29 *Eliz. c. 4.* or 3 *Geo. c. 15. sect. 17.* against it; and offered on payment of his poundage to bring up the body. But the court said, they could not be making bargains with people to obey their process, which they would enforce an obedience to, and leave the sheriff to his action of debt for the fees, which was his legal remedy. It went off at last, upon the sheriff's submitting to carry him to a judge's chamber. And *Foster*, justice, said, if he was brought to him, he would not turn him over till the poundage was paid. 2 *Strange* 1262.

An under sheriff refused to execute a *capias ad satisfaciendum* till he had his fees; and upon motion against him, the court said, that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion, *Salk.* 330. pl.

It was moved, that an under sheriff might attend for refusing to execute a *feri facias*, till his shilling pence was paid. But the court would not grant the rule, but said it was *extortion*, for which he might be *indicted*. *Salk.* 331. pl. 5.

In trespass and false imprisonment the defendant justified under an arrest, by virtue of a warrant, &c. and that he detained the plaintiff until he paid him one shilling and four pence for fees. And judgment this term was given for the plaintiff, because the defendant could not detain for his fees. *Lord Raym.* 4.

A man was arraigned of two felonies, and paid but for one deliverance only. *Bro. abr. tit. Fees*, pl. 8. cites 26 ass. 47.

If upon a statute, one sheriff takes the body, and another the goods, *per cur*: both shall have their fees. And where-soever the sheriff hath double trouble, he shall have double fees. *Comb* 220.

He who renders himself, and has *superfedeas* before he is arrested by *capias* in debt, shall make an attorney in bank at the day; and this, though *cepi corpus* be returned, and shall pay no fees upon the special matter returned, though he does not shew the *superfedeas* to the sheriff till after the taking, if he returns himself to him before the taking. *Bro. Abr. tit. fees*, pl. 4. cites 21 H. 6. 20.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have fees, though the writ be erroneous, *Salk.* 332.

A writ of false judgment was delivered to the under-sheriff, but no money was tendered or paid for the return; for want whereof the sheriff took no notice of it, and executed a writ *de executione judicii*. Upon hearing counsel on both sides, the sheriff's proceeding was held to be regular. *Per curiam*: The defendant, if he thinks fit, may still proceed upon his writ of false judgment. *Barnes's Notes*, 135.

By Stat. 32 Geo. 2. c. 28. sect. 2. "No sheriff, bailiff, or other officer, shall take any greater sum for one or more night's lodging, for for a day's diet, or other expences of any person under arrest in any process, other than shall be allowed by some order already made, or which shall be made, by some justices of peace at some general or quarter sessions for the county, or place where such arrest shall be, who are with all convenient expedition to make some standing orders for ascertaining such charges within their respective counties and jurisdictions, if the same hath not already been there made; and if any such order hath been made, such justices, at their general or quarter sessions, are to alter the same from time to time as they see occasion, and are to cause a copy of every such order, and of every alteration thereof, signed by the clerk of the peace, to be put and kept in some conspicuous place in the sessions-house, or some other proper place, of every such county, &c. as such justices shall order, so as the same may be there seen and examined as occasion may require."

By Sect. 5. "The lord chief Justice of the *King's-bench*, the lord chief Justice of the *Common-pleas*, and the lord chief Baron of the *Exchequer*, or any two of them, with the Mayor and two Aldermen, or with three Aldermen of *London*, without the *Mayor*, for the prisoners within the said city; and the said Lord Chief Justices and Lord Chief Baron, or any two of them, with three Justices of peace of the counties of *Middlesex* and *Surrey* respectively, for the prisons in the said counties respectively, are required, with all convenient speed, to meet from time to time at such place as they shall think fit, to settle a table of fees to be taken by any gaoler in *London* or in *Middlesex* and *Surrey*, where the same hath not been already established; and where the same hath been established, they are to meet and vary the same from time to time as they see occasion; and the Justices of peace of every other county and place, for the prisons in each county, &c. are, at any general or quarter sessions of the peace, with all convenient speed, to settle a table of the fees to be taken by any gaoler within their respective jurisdictions, where the same hath not already been settled; and where the same hath been settled,

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to alter the same from time to time as there shall be occasion. And the tables of such fees so made or altered for the several prisons within the city of *London*, and counties of *Middlesex* and *Surrey*, shall be signed by the said Lords Chief Justices, and Lord Chief Baron, or two of them, and the Mayor and two Aldermen of *London*, or by three Aldermen without the Mayor, and by three Justices of the peace of the counties of *Middlesex* and *Surrey* respectively : and the table of such fees made or altered for the rest of the prisons, shall be signed by three or more Justices of the peace, who make or alter the same at any general or quarter sessions of the peace ; and shall afterwards be confirmed, or moderated, within *England*, by the Justices of assize ; and if within *Wales*, or the county palatine of *Chester*, by the Justices of great sessions respectively, at the next assizes, or great sessions, in the respective counties within their several circuits next after the making or altering such table of fees ; and the same shall be afterwards signed by the respective Judges of assize ; or Justices of great sessions, who confirm or moderate the same, and three or four more Justices of peace of such county, &c. for the prisons within their respective circuits, counties, or jurisdictions."

By Sect. 12. " No keeper of any prison, or other person thereunto belonging, shall take directly or indirectly, of any prisoner for debt, damages, costs, or contempt, any greater fees for his commitment, chamber-rent, or discharge, than shall be allowed in the table of fees inrolled and registered as aforesaid ; and every sheriff and other officer who shall offend against this act, shall for every such offence (over and above such penalties as he shall be liable unto by the law now in force) forfeit to the party grieved 50 l. to be recovered, with treble costs, by action of debt, &c. in any court of record at *Westminster*, wherein no *essoins*, &c. shall be allowed."

The Warden of the *Fleet*, and the Warden of the palace of *Westminster*, may take bond for diet and due fees of the office. *Hetly* 176.

The sheriff may take a single bill for his fees, and that is the ordinary course, but not with a penalty. To this purpose

purpose there is a notable case. *Winch.* 20, 51. *Poph.* 176. *Noy* 75. *Mo.* 853. pl. *Lat.* 20, 51. 10 *Mod.* 85, 86.

The condition of a bond to the sheriff is to pay 20l. that is, for money which is given to him for his fees, which are due by the *Stat. 29 Eliz.* Defendant pleads the *Stat.* of 23 *H. 6. c. 10.* The case was, a statute of 200l. was acknowledged to the defendant by *J. S.* and this was extended by the plaintiff, being under sheriff, and it was agreed between *C. E.* brother to the plaintiff, and the under sheriff, before the *liberat* executed, that the defendant should enter into the said bond to the use of the plaintiff. Three points were resolved by the court.

1. This bond is not within the statute of 23 *H. 6.* for the party was not within the ward of the sheriff; and so was *Beaufage's* case.

2. Sheriff may not take his salary appointed by the statute till a complete execution, *i. e.* till the liberate; for the words of the statute are in the negative, and do not establish the fees, but only tolerate them. And by *Hobart*, if the *conisce* sue an *extent*, and refuse to sue the *liberate*, to the intent to defraud the sheriff of his fees, the sheriff shall have his remedy by action on the case.

3. This obligation is void by the common law, and extortion. See *Plowd.* 65. The sheriff may take a bond with a great penalty for the appearance of the party, but not for his fees, by the 23 of *H. 6. c. 10.* for that statute, as to fees, is not repealed by *Stat. 29 Eliz. c. 4.*

By *Holt*, Chief Justice, an action will lie for a sheriff's fee; for the laws permitting him to take it, makes it a duty. *Skin.* 363. *Comb.* 220.

Action of debt lies for a sheriff upon the statute of 29 *Eliz. c. 4.* for execution fees, although the statute doth not say he shall have the fees, nor any action for them; but only saith, he shall not take for any execution made, any consideration or recompence, besides what is therein mentioned which it shall be lawful for him to take, *viz.* 12d. for 20s. where the sum doth not exceed 100l. and 6d. above 100l. *Rel. Abr.* 598. *Rel. Rep.* 404.

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The sheriff shall have action on the case, but not debt, upon *assumpsit*, to pay his fees due by the law of the realm, for executing an execution. *Moor* 699. But he shall have debt for his fees not prohibited by the statute of 29 *Eliz.* *Moor.* 667, 853.

An action of debt was brought by the sheriff of *Cambridgeshire* upon the 29 *Eliz. c. 4.* for his fees for executing an *elegit*; and upon *nil debet* pleaded, there was a verdict for the plaintiff. And Mr. *Page* and Mr. Serjeant *Cheshire* took several exceptions in arrest of judgment. First, that no fees were due for executing an *elegit* within the statute, and consequently that the action lay not; for the land extended may be of little value, and therefore it is unreasonable that the sheriff should have poundage of the whole debt. And where the land lies in several counties, a man may pay more in fees than his debt. And the case of *Bridge and Cage*, 2 *Cro.* 103. was cited. An *assumpsit* in consideration that the plaintiff would execute a writ of *elegit* for a friend of the defendant's, to pay, &c. and held, that no action would lie, though the money promised to be paid, was no more than his shilling pence come to. In answer to this exception, Serjeant *Parker* cited the case of *Spring v. Eeds*, which was intr. *Hil.* 28, 29. *Car.* 2. *C. P. Rot.* 1410. where in the very same action judgment was given for the plaintiff, and that judgment affirmed in the *King's-bench*, the record of which affirmance is *Hil.* 29. and 30 *Car.* 2. *K. B. Rot.* 386. As to the objection where the land should happen to lie in several counties, there was nothing of that in the present case. The reason of the case in 2 *Cro.* he said, was, because in that time the judges held no action would lie upon the statute; but that has been held otherwise since, 1 *Cro.* 286, 287. *Jones* 301. where actions are maintained by sheriffs for fees for executing a *capias ad satisfaciendum*.

Holt, Chief Justice, said, There was no reason why the sheriff should not have fees, as well for executing an *elegit*, as an extent upon a statute. Upon the writ of *elegit*, the sheriff returns, that he has taken an inquisition, and extended the defendant's land, and delivered it to the plaintiff. And there is a *liberat* in the body of the writ *elegit*, otherwise

wife in case of an extent upon a statute there must be a *liberate*; and in the case of the *elegit*, upon the return of delivery the plaintiff may enter: and he can do no more in case of a statute after a *liberate* executed, for he must enter by force. The return of *liberari feci* is a full execution of the writ of *elegit*, and by that the plaintiff becomes tenant by *elegit*, and may maintain an ejectment; and he may enter and assign his interest upon the bond, and the assignment will be good. For the defendant's continuing in possession after the return of the writ, turns the plaintiff's estate to a right, and therefore he must enter before he can assign it over.

Powell, Justice said, That the like case with this was adjudged in the *Common-pleas*, while he sat there; that all the objections, that are here made to the action, were made there, and over-ruled; that the court were resolved, that the statute of *Eliz.* mentioning extents, that should not be confined to extents upon statutes only, but should be carried to extents upon *elegits*, especially when they were both equally liable to the same exceptions. As to the objection how it should be, when several *elegits* were to go into several counties, they said they would give their resolution in that when it came in question; and therefore he was of opinion, that the sheriff should have his fees for executing an *elegit*. The other two Judges agreed.

The second exception, and which was the only one that stuck with the court, was, that the plaintiff had laid in his declaration, that the inquisition was taken *apud villam Cantabrigiæ prædictæ*; and there was no *Cambridge* mentioned before. And this objection was enforced two ways. First, There was no *venue* where this fact, which was so material, and the very ground and foundation of the action, was done. Secondly, That it did not appear that this inquisition was taken within the county of *Cambridge* as it ought to do, to intitle the plaintiff to his action: For as *Powell*, Justice, said, there are more towns in *England* of that name besides that where the university is, and for aught appears, it might be one of them where this inquisition was taken, and consequently out of the county; and so the execution void, and consequently the plaintiff has no cause of action.

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After consideration as to the first part of the objection, it was resolved by *Holt*, Chief Justice (to which the others agreed) that this was helped after verdict by the statute 17 Car. 2. c. 8. as no *venue*, the cause having been tried by a jury of the proper county. And he compared it to the case in *Lev. 207.* upon an issue joined in an action of covenant, whether *J. S.* had any title to *Shrob-walk* in the forest of *Whittlewood*, in the county of *Northampton*? The action was laid in *London*, and the *venire facias* was from *Shrob-walk*; and though it was agreed, that a walk in a forest was but a liberty, and no place from which a *venue* could arise, yet this want of a *venue* was aided by the 17 Car. 2. the issue having been tried by a jury of the county where the matter in issue arose. As to the second it was answered by the counsel for the plaintiff, and resolved by the court, that that was helped by the verdict, for the issue being upon *nil debet*, if the *elegit* had been executed out of *Cambridgeshire*, it had been a void execution, and consequently against the plaintiff, and the jury must have found for the defendant *quod nil debet*; and therefore a verdict being now found for the plaintiff, it must be intended that *Cambridge* is the county of *Cambridge*, for it must be intended that a record was given in evidence of an inquisition taken within the county of *Cambridge*. Judgment was given for the plaintiff. 2 Lord Raym. 1212. *Salk.* 333.

The giving money to a sheriff, to arrest a man, is against law. *Rel. Rep.* 313.

It was held that a sheriff cannot take money for fees upon delivery of warrants to his own bailiff, but must stay till the money is levied; but in case of special bailiffs, of plaintiff's own naming, the sheriff may take his fees presently. *Clayt.* 79. *Mo.* 468. pl. 669.

No fee is due to the sheriff for executing a *cap' utlegat'* either for warrant to execute it, or for the return of it. *Lit. Rep.* 65. 2 *Brownl.* 283.

If any bailiff or other sheriff's officer, shall take any thing of any person, to spare them for appearing at the assizes,

assizes, sessions of the peace, or the like, it is extortion. *Compl. Sher.* 483.

On rule to shew cause why an attachment should not go against one *Clendon*, for extorting two guineas from the defendant, before he would allow him to be bailed; his counsel said, that the defendant absconded, and for that reason *Clendon* was forced to be made a special officer in the writ, and the fee for that is 10s. of the money. *Besides*, he was two days lying in watch for him, with a couple of followers; he thought 1 l. 12 s. little enough for that. The court said, the fee of 10s. is certainly due, and the rest of the money is moderate enough; but yet it ought not to have been demanded of the defendant, so granted the attachment. *K. B.* 107.

If the sheriff, or any of his officers, shall take any money, or other reward, for the omitting any arrest or attachment to be made, it is extortion; and the sheriff or officer so offending, shall forfeit for every such offence 10 l. to the king and informer. 23 *Hen. 6. c. 10.*

As to the punishment of sheriffs for extortion, it is either by indictment, information, imprisonment, or commitment.

As to indictments, what is good or not.

Indictment of extortion against a bailiff of an hundred, *quod colori officii*, he took *extorsive* money, and shews not for what matter or cause. *Court*: It is well enough, the officer being bailiff of an hundred, especially being after a verdict. But *quære* of this. *Keb.* 557. pl.

By 23 *Hen. 6. c. 10.* on extortion, treble damages are given to the party, and the justices of peace may assess them; but they ought first to enquire of the damages by a jury. Therefore in *Bumpstead's* case, *Cro. Car.* 488. pl. Indictment was against the sheriff for extortious fees, on two several indictments. They awarded to the one treble damages; that is, where he took of one 20 s. *extorsive*, they awarded to the party 3 l. and 4 l. to the king. And on the other, where it was found he took 8 s. and 8 d. *extorsive*, they awarded he should pay to the party 26 s. and

and 8 d. So a quadruple value, and 20 s. fine to the king. And it was adjudged *error*.

The indictment must be *contra formam statuti*, if they will proceed upon the statute of 23 H. 6. *ibid*. The court were doubtful, if this statute extends to extortion, unless taken upon arrest. And judgment was reversed.

The sheriff's bailiffs were indicted at the quarter sessions for extortion. *W. Jo.* 379.

It was said by *Holt*, Chief Justice, at a trial at *Guildball*, that if a man be indicted for taking extorsively 20 s. and there is but proof of *one shilling*, yet the defendant is guilty. And (by him) the extorsive agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. *Lord Raym.* 149.

An informer, on conviction of a prisoner for extortion, or other penal law, may have the third part of the fine, according to the king's privy-seal for that purpose. And he had so of 10 l. set on a bailiff for 3 l. taken for execution done to his person. *Keb.* 357. pl. 487. pl.

An information was brought against the keeper of the gaol, or prison of the castle of *Maidstone*, for extortion on *Stat.* 23 H. 8. and it was found by special verdict that there is not any castle in *Maidstone* but a gaol, and the defendant was gaoler there. *Per curiam*. Judgment for the plaintiff. 2 *Roll. Abr.* 211.

The sheriff was committed to the *Fleet*, for taking illegal fees. 2 *Brownl.* 283.

A serjeant of *London* was committed in execution for a fine in extorting fees on an arrest, and a third part was allotted to the prosecutor; his wife petitioned the court to mitigate the fine, but they could not. 3 *Keb.* 328. pl.

The sheriff of *Suffolk* was imprisoned for taking *a guinea*, there being only 2 s. due to him, and he returned two *guineas* to the plaintiff, being double of what he had taken,

on *Stat. 3 Edw. 1. c. 26.* and so he was discharged. 3 *Keb.* 714. pl.

In replevin, *the sheriff prescribed to have forty shillings per annum* of J. N. and his ancestors, *for holding of his turn at D. for the ease of the defendant and his tenants*, for which sum he distrained.

Per curiam : He cannot prescribe, for he is an officer removeable yearly, and therefore the taking the said sum is *extortion*. *Bro. tit. fees, &c. pl. 18. 42 Eliz. 3. 4. Bro. Abr. tit. Corone, pl. 103. S. C. per Shard. Bro. Abr. tit. Office and Off. pl. 31. S. C. S. P. Bro. Abr. tit. prescription, pl. 9. 40 Eliz. 3. 4.*

If a sheriff, &c. assume for money given to serve certain process, this is not a good consideration, as being against law; for it is extortion in the sheriff to take it, and unlawful for the other to give it. *Rol. Abr. 16. 19 Vin. Abr. 445. pl. 3. Ergo Cro. Eliz. 654. is not law.* Executor sues execution by *Elegit*, and B. a stranger, as a friend to the executor, in consideration that the sheriff will execute the said *Elegit* presently, and of sixpence paid him by the sheriff, assumes to pay 60 l. to him, whereupon the sheriff executes the writ. This consideration is against law, for the sheriff ought to do his duty without reward; and this 60 l. is not any discharge of sheriffs fees due by the statute, being given by a stranger, and not express for them. *Rol. Abr. 16.* And though it was alledged, that this sum promised him is no more than what the statute of 29 *Eliz.* allows him to take for his fees, yet that helps not the case, for that Statute only excuses him for his taking fees, whereas the common law did not permit him to take any thing for the executing writs; and the giving of sixpence is no sufficient consideration, being joined with the other that is unlawful. *Cro. Jac. 103.*

A. is outlawed at the suit of B. for debt, and B. assumes, in consideration that C. a stranger will arrest A. upon a *Cap' Utlegat'*, that he will pay him 40 s. This is no good consideration, although he shews in his declaration that he was after made a special bailiff to the sheriff, to arrest him by a warrant directed to him. This is extortion; and the
sheriff

sheriff by such means may extort great sums for doing his office: And the bailiff is the officer of the sheriff, and his servant. *Rol. Abr. ib. Jones 65. Latch. 54.* But if a promise be made to a mere stranger to go to the sheriff and procure him to arrest *J. S.* this is a good consideration. So if one pay me to go with the sheriff to assist him in making execution, and promiseth me, &c. it is good.

Notwithstanding the foregoing Statutes, and the determinations of the courts of Justice thereon, custom has established the following fees:

	<i>£</i>	<i>s</i>	<i>d</i>
Officer for an arrest on common process -	0	10	6
On a special capias - - - - -	1	1	0
For levying execution - - - - -	1	1	0
For executing a writ of possession over and above the sheriff's poundage by statute -	1	1	0
Man in possession on execution, if he finds himself, <i>per diem</i> - - - - -	0	3	6
If found by the house, <i>per diem</i> - - -	0	2	6

All other demands of bailiffs, serjeants at mace, &c. are matters of extortion, for which they are punishable by the statutes and rules and orders of the courts of Justice.

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